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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

EVERARD C. CALL and BETH S. CALL,
Petitioners,

vs.

CALIFORNIA TAHOE REGIONAL PLANNING AGENCY,
Respondent.

On Writ of Certiorari to the Court of Appeal of the State of California Third Appellate District

PETITION FOR WRIT OF CERTIORARI

ALAN H. NICHOLS
NICHOLS, DOI & RAPAPORT
1032 Broadway
San Francisco, CA 94133
(415) 775-8200
Attorneys for Petitioner

103PP

QUESTIONS PRESENTED

Defendant governmental agencies working in concert sold to petitioners municipal bonds in order to construct public improvements. Certain real property (hereinafter referred to as "Parcel 351") was pledged as security in case of nonpayment on the bonds. Thereafter, these agencies, including the respondent California Tahoe Regional Planning Agency ("hereinafter CTRPA'), retroactively used their zoning powers to make Parcel 351 worthless and to deny to Parcel 351 all use of the public improvements which were built for use by Parcel 351 and the adjoining subdivisions.

1. Does such conduct violate Article I, Section 10, Clause 1 of the United States Constitution as an impairment of the obligation of contract?

2. Does such conduct violate the Fifth and Fourteenth Amendments to the

United States Constitution as a taking of property for public use without just compensation and without due process of law or as a denial of equal protection of the laws?

3. Can the doctrine of res judicata be expanded to transform a California Court of Appeals decision (Call v. Feher, 93 Cal. App. 3rd 387, 155 Cal. Rptr. 397 (1979)) on the petitioner-bondholders' ordinary foreclosure action against the original landowners for nonpayment of the bond into a decision upholding the power of governmental agencies to deny bondholders' constitutional rights?

4. Can California governmental agencies by the use of their zoning powers override the clear principles set forth in this Court's landmark decision in United States Trust Co. v. New Jersey?[1/]

1/ There were no parties, other than the petitioners and respondent CTRPA, to the proceeding in the Court of Appeal whose (footnote continued)

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(footnote continued from previous page) judgment is sought to be reviewed. However, the California Regional Water Quality Control Board, Lahontan Region, and the Tahoe Regional Planning Agency were also named and served as defendants.

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NO.

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1984

EVERARD C. CALL and BETH S. CALL,

Petitioners,

v.

CALIFORNIA TAHOE REGIONAL
PLANNING AGENCY,

Respondent.

Petition for Writ of Certiorari to the
Court of Appeal of the State of
California,
Third Appellate District

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Everard C. Call and Beth S. Call, the petitioners herein, pray that a writ of certiorari issue to review the judgment of the Court of Appeal of the State of California, Third Appellate District, entered in the above-entitled case on February 23, 1984.

I.

OPINIONS BELOW

The opinion of the Court of Appeal of the State of California, Third Appellate District is unreported and printed in Appendix A hereto. (A1 - A16). The judgment of the Superior Court of the State of California in and for the County of Placer is printed in Appendix A hereto. (A17 - A23).

II.

JURISDICTION

The judgment, printed in Appendix A hereto, which is sought to be reviewed was entered on February 23, 1984. A hearing in the California Supreme Court was denied on May 23, 1984.

The jurisdiction of the Supreme Court is invoked under Section 1257(3) of Title 28 of the United States Code. This petition is timely filed under Section 2101(c) of Title 28 of the United States Code.

III.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional provisions which petitioners contend have been violated by the actions of respondent CTRPA and its co-defendants are Article I, Section 10 of the United States Constitution, commonly known as the "Contract Clause," which

provides in part as follows:

> No State shall ... pass any ... law impairing the obligation of contracts ..."

This case also involves the following clauses of the Fifth Amendment:

> No person shall be ... deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

and the first section of the Fourteenth Amendment to the Constitution of the United States which provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The case also involves Section 5.13 of

the Land Use Ordinance of the California Tahoe Regional Planning Agency (hereinafter referred to as "CTRPA"), the text of which is included in Appendix B hereto.

IV.

STATEMENT OF THE CASE

This case concerns governmental land use restrictions which have unconstitutionally impaired contractual obligations and taken for public use without compensation the security for a street improvement bond issued by the County of Placer, State of California, and purchased by the petitioners. The security for the petitioners' bond was a parcel of land situated within the Kingswood West Assessment District in Placer County, and known as Assessment number 351 (hereinafter referred to as "Parcel 351").

The principal questions raised by this

petition concern the future integrity of municipal finance in California and the profound effect which the Court of Appeals decision, if not reversed, will have on the rights of municipal bondholders. In this case, the Court of Appeal misapplied the doctrine of res judicata by concluding that its adjudication of a prior action (a second amended cross-complaint) brought by landowners (not petitioners) against the California Tahoe Regional Planning Agency (hereinafter "CTRPA") in Call v. Feher, 93 Cal. App. 3d 387, 155 Cal. Rptr. 397 (1979) (in which cross-complaint the petitioners were not even involved), completely bars the petitioners' complaint against CTRPA. The effect of this decision is to preclude the petitioners, the same bondholders whose bond foreclosure rights had been upheld in Call v. Feher, from even bringing suit for the total elimination of their security for

the bond upon which they foreclosed and in complete disregard of the bondholder contract with the County of Placer (the issuing entity).

This decision leaves unsettled important questions of law. This case is one of first impression as to: (1) the right of municipal bondholders to recover damages for the taking of the security for their bonds; (2) the power of one governmental unit to use the zoning power to relieve another governmental unit of its specific financial obligations; (3) the right of bondholders to their security interest in real property after they have perfected title to that security; and (4) the application of the res judicata doctrine to preclude bondholders from litigating their constitutional rights relating to their security.

Summary of Facts

a. Constitutional issues

Since the trial court decided this case on demurrer, the following facts must be taken as true:[2]

(1) All the defendant governmental agencies acted in concert and conspired to confiscate petitioners' property for public use, so that the act of one agency is the act of all. (CT, p. 4, lns. 10-14; p. 11, lns. 26-28; p. 22, lns. 23-28)

(2) Petitioners entered into a contract with defendant Placer County of the State of California.[3]

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[2] Chapman v. Sheridan-Wyoming Coal Co., 338 U.S. 621, 622, 70 S. Ct. 392, 393, 94 L. Ed. 393, 396 (1950); HFH, Ltd. v. Superior Court, 15 Cal. 3d 508, 511, 125 Cal. Rptr. 365, 367, 543 P. 2d 237 (1975).

[3] The petitioners' complaint states:

> At all times enumerated herein, there existed by virtue of Defendant County's resolutions, activities and conduct, including the forming of the said Defendant Assessment District and

(footnote continued)

(3) Petitioners' contract with Placer County was breached by defendants and respondents acting in concert.[4]

(footnote continued from previous page)
construction of Improvements pursuant thereto, a contract, expressed or implied, between Plaintiffs and Defendant County to benefit the subject property and to assure that the subject property continues as security for said issuance of Bond 343, as a publicly prescribed residential subdivisible property under the zoning and land use laws of Defendant County, and its policies, declarations and conduct in further consideration of Plaintiff's purchase of the bonds in the face amount of $98,867.54 (CT, p.15, lns. 24-28; p. 16, lns. 1-3).

[4] The Complaint states:

> The adoption of said [land use] moratoria and the enforcement, by judicial procedure and otherwise, as well as moratoria on the issuance of sewer permits and the refusal of Defendant County to allow Plaintiffs to proceed with development for lawfully prescribed residential uses, and the Defendant County's attempt to sell said property at a tax sale, constitute a
> (footnote continued)

(4) Petitioners' sole security for the payment of their bond was rendered worthless by defendants' and respondent's actions. (CT p. 15, lns. 6-15).

In 1970, the Placer County Board of Supervisors established the Kingswood West Assessment District to construct certain public improvements and to issue special assessment bonds to pay the costs thereof. (Clerk's Transcript [hereinafter "CT"], p. 4, lns 20-21, p. 5, lns. 5-11) The public improvements to be constructed by Placer County included a system of sewers, roads, drainage facilities, concrete dikes, street and traffic control signs, and underground power and telephone facilities. (CT, p. 4, lns 21-27) Placer County ("county") issued the bonds pursuant to the Improvement Act of 1911

(footnote continued from previous page)

> breach of the express or implied contract described above.

(CT p. 16, lns. 11-15).

(Sts. & Hy,. Code §§ 5000 et seq.)[5/] and the Municipal Improvement Act of 1913 (Sts. & Hy. Code §§10000 - 10609). Each bond was a direct lien upon each of the respective parcels in the assessment district. (CT, p. 7, lns. 8-14) The county sold bond number 343 to the appellants in April 1971 (CT, p. 4, ln. 18) and agreed to construct the

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5/ The Improvement Act of 1911 (Stats 1911, Ch. 397), upon which petitioners' rights are predicated, provided for the issuance of bonds secured by assessments levied to pay for local improvements. The assessment is a first lien upon the property affected until the bond is fully paid. Sts. & Hy. Code §6446. If the bond is not paid, the bondholder may commence a judicial foreclosure preceding. Sts. & Hy. Code §6610. After judgment of foreclosure and order of sale, the sheriff is instructed to sell the property to the highest bidder. Sts. & Hy. Code §6615. In the event there are no bidders, and there were none in this case, a certificate of sale for the entire lot or parcel of land described in the bond is issued to the bondholder. If the bond is not redeemed, the bondholder becomes entitled to receive a deed which conveys to the grantee "the absolute title to the lands described therein...free of all encumbrances" with certain specified exceptions. Sts. & Hy. Code §6555.

improvements. The petitioners made a substantial financial commitment by paying $98,867.54 for the entire bond. It was understood and agreed by petitioners and the county that since the bond was an "acreage" bond not secured by an individual lot that the county would allow the property to be subdivided so as to make use of the public improvements. (CT, p. 5, lns. 1-5, p. 6, lns. 1-4, p. 15, lns. 24-28, p. 16, lns. 1-3). The petitioners' bond was directly secured by the parcel of 30+ acres of land known as Assessment number 351, which is the subject of this action ("Parcel 351"). (CT, p. 4, lns. 18-19, p. 7, lns. 27-28). The improvements were constructed and sized to service Parcel 351 upon its subdivision. (CT, p. 6, lns. 5-7). The special benefits for which the petitioners paid formed a key part of the security for their bond.

In September 1975, respondent California Tahoe Regional Planning Agency ("CTRPA") enacted its Land Use Ordinance (hereinafter "Ordinance") which prohibited, under certain defined circumstances, the subdivision of Parcel 351. Respondent CTRPA and its co-defendants, Placer County, the Tahoe Regional Planning Agency ("TRPA") and other agencies participated in the drafting and planning of the Ordinance. (CT, p. 10, lns. 11-15) CTRPA also obtained an injunction against the county which enjoined the county from considering or allowing the subdivision of Parcel 351. (CT, p. 10, lns. 15-22).

In January 1976, the owners of Parcel 351 ("landowners") defaulted in the payment of principal and interest on the petitioners' bond. Appellants filed a bond foreclosure complaint in June 1976. After considerable proceedings (Call v.

Feher, 93 Cal. App. 3d 434, 155 Cal. Rptr. 387 (1979)), the petitioners finally completed the foreclosure and took title to Parcel 351 after no buyers bid on the land at a sheriff's sale.

As a result of the conspiracy of the aforementioned public agencies, petitioners acquired title to worthless security (i.e., the "regulated" land). (CT, p. 10, lns. 23-26, p. 11, lns. 10-25, p. 12, lns. 11-19, p. 15, lns. 6-7) The petitioners' efforts to develop, sell, rent, otherwise use, or obtain relief from the restrictions on the property have been unsuccessful. (CT, p. 12, lns. 25-28) Since the bond-financed, public improvements were constructed, the land is only fit for residential subdivision. (CT, p. 9, lns. 6-11). Parcel 351 is now burdened with traffic, sewer lines, utility lines and drainage facilities from which the property has never derived any

benefit whatsoever. However, residential use and subdivision is prohibited by governmental edict to this day, even though Parcel 351 is surrounded by residential subdivisions. (CT, p. 14, lns. 27-28, p. 15, ln. 1). In the meantime, petitioners are liable for payment of continuing assessments to Parcel 351. Petitioners have received nothing of benefit in exchange for financing improvements which have been operational for over a decade.

b. Procedural history

Petitioners' complaint in this action was dismissed by the California courts on the grounds that a prior foreclosure action, Call v. Feher, supra, was res judicata on the issues raised in this action.

The petitioner-bondholders were only involved in the foreclosure action against the landowners in Call v. Feher.

As a response to petitioners' foreclosure complaint in the prior action, the landowners filed (in March 1977), a cross-complaint against petitioners and CTRPA. The cross-complaint asked for a declaratory judgment that: (1) the petitioners had no right to foreclose the assessment bond; (2) the landowners had a vested right to subdivide the land; and (3) the CTRPA Ordinance was unconstitutionally vague. Thus, petitioners and CTRPA were both cross-defendants. Petitioners and respondent CTRPA did not actually oppose each other and litigate issues adverse to each other in Call v. Feher.

The petitioners demurred generally to the cross-complaint in April 1977, and the trial sustained the demurrer with leave to amend. Later in April the court granted petitioners' motion to sever the bond foreclosure action from the cross-

complaint. In June 1977, petitioners were dismissed with prejudice from the cross-complaint. Thereafter, petitioners were not parties to the landowners' action for declaratory relief. The Calls never participated in the landowners' cross-complaint against CTRPA.[6/]

In November 1977, the landowners filed a second amended cross-complaint only against CTRPA (not petitioners), on further "vested right" theories, i.e., to develop Parcel 351 by reason of the preliminary steps which had been made toward subdivision before the adoption of the subdivision restrictions in the CTRPA Ordinance. The court held the landowners

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6/ It was extremely difficult for the trial and the appellate courts to understand how unrelated procedurally and substantively the CTRPA and foreclosure actions were. The complete separation of the Calls' foreclosure action and the landowners' cross-complaint is better illustrated by the chart of the Call v. Feher litigation in petitioners' petition for hearing before the California Supreme Court.

failed to exhaust their administrative remedies to rezone Parcel 351.

No objections were raised in the proceedings as to the propriety of the assessment against the subject property, the validity of the bond and its issuance, petitioners' bond ownership, and the foreclosure procedures under the Streets and Highway Code. Petitioners, moreover, were not parties to the adjudication regarding the landowners' claim for declaratory relief. The trial court had severed the foreclosure action in May, 1977, and petitioners had been dismissed from the last cross-complaint more than seven months prior to CTRPA's successful demurrer.

The Court of Appeal in Call v. Feher, after consolidating appeals by the landowners from the foregoing decisions (over the petitioners' objections), upheld the summary judgment in the petitioners'

foreclosure action and the judgment of dismissal in favor of CTRPA. Call v. Feher, supra, at 446, 155 Cal. Rptr. at 393.

The resolution of those issues against the landowners in no way affected the favorable resolution of petitioners' complaints to foreclose.

How the Federal Questions Were Raised Below

Petitioners, in their Complaint asserted that the land use moratoria and ordinances enacted retroactively by the defendants, and the refusal to allow development of Parcel 351 constituted impairment of the contract between the petitioner-bondholders and defendant Placer County in violation of the Contract Clause of the United States Constitution and that the actions of respondent and its co-defendants constituted a taking of the petitioner-bondholders' promised source of

security for repayment of the monies lent (i.e., Parcel 351), the improvements built thereon and the vested development rights therein without payment of just compensation in violation of the Fifth and Fourteenth Amendments to the Constitution.

The Superior Court sustained respondent's demurrer to the Complaint on the ground that petitioners' claims were barred by the doctrine of res judicata, and specifically by the judgment in the prior decision of Call v. Feher which held that "the obligations under the bond were not relieved." (A22).

The Court of Appeal affirmed for substantially the aforementioned reasons and there was "no controversy here as to the impairment of any contract or bond obligation." (A8). Petitioners' petition for hearing before the California Supreme Court was denied on May 23, 1984. (A-24)

V.

REASONS FOR GRANTING THE WRIT

A.

A state may not use its police power retroactively and unilaterally to impair special assessment bondholders' contractual and constitutional rights under the Contract Clause of the United States Constitution.

The present case concerns the integrity of the state's financial obligations, and whether or not respondent CTRPA's elimination of the petitioners' bond contract rights was constitutionally warranted. This case is one of first impression. It is not a case of adjusting opposing landowner and governmental interests in open space zoning, but will determine whether land use restrictions passed by one governmental body (CTRPA), in concert with another governmental agency, can be used to relieve the other governmental unit (Placer County), contrary to its agreements, of its

specific financial, contractual obligations. Significantly, the prior action of Call v. Feher never reached the issue whether one governmental agency is permitted to make a promise to entice investment in municipal bonds, only to have another arm of government repudiate that promise when it regulates land use through the exercise of its "police power." See Holliman, "Development Agreements and Vested Rights in California," 13 The Urban Lawyer 44 (1981).

In affirming the judgment in favor of CTRPA, the appellate court precluded petitioners from obtaining a full and fair hearing on their constitutional rights, in spite of the federal and state courts' longstanding protection of municipal bondholders' rights from subsequent contractual impairment by legislative act. This court should, therefore, grant a writ

of certiorari in this case.

Article I., Section 10, Clause 1 of the United State Constitution provides: "No State shall ... pass any ... law impairing the obligation of contracts." The California Constitution contains a parallel proscription. (Art. I, §9). Under well settled principles, these contract clauses limit the power of a state to modify its own contracts with other parties. United States Trust v. New Jersey, 431 U.S. 1, 17, 97 S. Ct. 1505, 52 L. Ed. 2d 92, 106 (1977); Valdez v. Cory, 139 Cal. App. 3d 773, 189 Cal. Rptr. 212, 220 (1983). The meaning and application of a state statute that is challenged as violating the contracts clause is a question of federal law. Coombes v. Getz, 285 U.S. 434, 441, 52 S. Ct. 435, 436, 76 L. Ed. 866 (1932); see American Toll Bridge Co. v. Railroad Comm'n, 307 U.S. 486, 489, 59 S. Ct. 948, 951, 83 L. Ed.

1414 (1939); Rapid Transit Corp. v. New York, 303 U.S. 573, 593, 58 S. Ct. 721, 731, 82 L. Ed. 1024 (1938).

Since the nineteenth century, this Court has held that once legally authorized municipal obligations are outstanding, a legislature cannot impair the terms protecting creditors' rights to payment when due. Scotland County Court v. United States, 140 U.S. 41, 46-47 (1891); Ralls County Court v. United States, 105 U.S. 733, 735-736 (1881). These early cases establish a fundamental doctrine of municipal bond law: the power to raise taxes or whatever revenues are pledged for the payment of principal or interest on debt obligations imposes a trust on the municipality to honor the terms of payment which cannot be impaired. Von Hoffman v. Quincy 4 U.S. (Wall) 535, 550, 18 L. Ed. 403 (1867); 6 Fordham Urban Law Journal 1, 15 (1977). Strict

compliance with the terms of public contracts is necessary. Murray v. Charleston, 96 U.S. 432, 24 L. Ed 760 (1877). The bondholders' contract would be worthless and would represent only abstract rights if the municipality were free to excuse itself. Von Hoffman v. Quincy, supra, 4 U.S. at 555. A promise in a contract that gives to one party the power "to deny or change the effect of the promise is an absurdity." United States Trust Co. v. New Jersey, 431 U.S. at 25 n. 23, 97 S. Ct. at 1519 n. 23 (quoting Murray v. Charleston, supra.). Moreover, the laws under which public bonds are issued become a part of the contract between the bondholders and the issuing authority. Home Bldg. & L. Assn. v. Blaisdell, 290 U.S. 398, 429-430, 54 S. Ct. 231, 78 L. Ed. 413, 423-424 (1934). No change in these laws may be permitted to "cut down the security" of the bond

obligation. W. B. Worthen Co. v. Kavanaugh, 295 U.S. 56, 60, 79 L. Ed. 1298, 1301, 55 S. Ct. 555 (1935).

These concepts -- that a municipal bond confers upon the bondholder certain specific rights of security for a debt as well as the right not to have the security impaired remain valid today. Superior Sav. Ass'n v. City of Cleveland, 501 F. Supp. 1244, 1248 (N.D. Ohio 1980). The assessment bond issued by Placer County and purchased by petitioners formed a binding contract. City of Zephyrhills, Florida v. R.E. Crummer & Co., 237 F. 2d 338, 341 (5th Cir. 1956).

The case which supports the granting of the instant petition for certiorari, is United States Trust v. New Jersey (hereinafter "U. S. Trust"). In that case, this Court formulated the general rule that the police power does not permit a modification of the terms securing

payment under a contract entered into under the municipality's spending, borrowing and taxing powers. U. S. Trust, supra, at 19, 52 L. Ed. 2d at 108) (legislation which retroactively repealed a statutory bond covenant eliminated an important security provision and, thus, unconstitutionally impaired the obligation of the state's contract with the plaintiff-bondholders). 7/

7/ U. S. Trust was one of the long line of cases stretching back to Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 3 L. Ed. 162 (1810), addressing efforts by the states to repudiate by subsequent legislation their own contractual undertakings. Despite early deference to such legislation, the Court in U. S. Trust applied a higher standard of scrutiny to state abrogations of their own contractual arrangements than to state efforts to modify purely private agreements. The Court reasoned that when the state is a party to the contract, "complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake." 431 U.S. at 26, 97 S. Ct. at 1519, 52 L. Ed. 2d at 112. In these cases, the Court held, it would apply a more exacting standard of scrutiny, examining whether "a less

(footnote continued)

The indisputable facts of this case satisfy the three-step analysis required by U. S. Trust. (Energy Reserves Group, Inc. v. Kansas Power and Light Co., ____ U.S. ____, 103 S. Ct. 697, 74 L. Ed. 2d 569 (1983)):

1) Contract "substantially impaired." Petitioners were promised subdivisible and improved land as security for their bond. That promise was absolutely necessary to induce the petitioners and the investing public to purchase improvement bonds and lend their funds to Placer County. Petitioners' contractual relationship with the county was absolutely repudiated by respondent (and other land use agencies in the Tahoe area), when respondent denied all reasonable and beneficial uses of

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(footnote continued from previous page) drastic modification would have" sufficed and whether the modification was reasonable in light of changed circumstances. Id. at 30-32, 97 S. Ct. at 1521-1522, 52 L. Ed. 2d at 114-116.

Parcel 351 and thereby eliminated the sole source of security specifically pledged by state law for payment of bonded indebtedness. See Energy Reserves, supra, 103 S. Ct. at 704-705.

2) "Public purpose unjustified." The conservation of Lake Tahoe is not a "significant and legitimate public purpose which supports the impairment of petitioners' bond contract. " See Id. at 705. The streets and other improvements have already been placed on Parcel 351. The only additions would be necessary feeder lines and construction, all of which could be accomplished without adversely affecting the environment.

3) No reasonable adjustment of the contracting parties' rights. The land, which was essential to the payment and security of the petitioners' bond, was rendered worthless as a result of respondent CTRPA's unreasonable actions.

This drastic impairment of petitioners' contract rights was unnecessary.

Petitioners, as purchasers of municipal bonds, represent perhaps the most conservative of investors; they were willing to sacrifice higher yields because of the tax benefits which accompany this type of obligation, the almost absolute assurance of repayment and, in the meantime, the assurance of a liquid investment. Petitioners financed the public improvements to Parcel 351 all upon the market's understanding that the contractual undertakings between issuers and private investors are sacrosanct. The drastic and substantial impairment of petitioners' security could not have been contemplated at the time petitioners purchased their bond in 1971. Thus, the application of the respondent's subdivision restrictions to Parcel 351 completely defeated the expectations of

the parties under their bond contract. Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 244, 98 S. Ct. 2716, 2722, 57 L. Ed. 2d 727 (1978). The direct effect of the Ordinance was to eliminate payment of the bonded indebtedness.

The challenged ordinance (particularly when viewed in combination with the other continuing subdivision restrictions and sewer connection bans enforced by respondent's co-defendants in the Lake Tahoe area), constitutes an "oppressive and unnecessary destruction of nearly all the incidents that give attractiveness and value to collateral security" in this case. W. B. Worthen Co. v. Kavanaugh, supra, 62, 79 L. Ed. at 1302(1935). It is difficult to imagine a clearer case of impairment of contract. 8/

8/ The Court of Appeal's conclusion that the Ordinance affected only the "property and not the legal obligations under the bonds" was based on an erroneous

(footnote continued)

Nevertheless, the Court of Appeal -- on the slender reed of res judicata -- approved the complete reversal of a hundred years of bond law and constitutional principles not only established by this Court but recognized

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(footnote continued from previous page) application of language derived from the case of Northwestern National Life Insurance Co. v. Tahoe Regional Planning Agency, 632 F. 2d 104 (9th Cir. 1980). Northwestern is distinguishable for the following reasons: (1) The land use ordinance challenged in Northwestern did not eliminate the bondholders' security, but only affected a right to a sinking fund, under Nevada law. See Northwestern Nat. Life Ins. Co. v. Jordan, 447 F. Supp. 856, 860 (D. Nev. 1978). In this case, the Calls' only remedy was to foreclose against Parcel 351 itself. (2) The subject land in Northwestern was not shown to be worthless. Only 243 acres of the plaintiff's 443 acre parcel was rezoned. Northwestern, supra, 632 F. 2d at 105. (3) The plaintiff in Northwestern did not contend that the challenged ordinance altered either the express terms of the bonds or the obligations of the parties to the bonds. Petitioners do, however, seek recovery on these grounds. (4) The Northwestern plaintiff did not bring suit on inverse condemnation grounds based on Furey v. City of Sacramento, 24 Cal. 3d 862, 157 Cal. Rptr. 684, 598 P. 2d 844 (1979).

by the Supreme Court of California, as well as the courts of many other states. 9/ The Court of Appeal unjustly barred petitioners from even attempting to recover monies lent in good faith pursuant to a duly adopted special assessment and agreement. Neither the trial nor the appellate courts engaged in the three-step analysis constitutionally required by the U. S. Trust case. Hence, at no time have any of the courts even considered whether respondent's elimination of the petitioner-bondholders security was justified as an appropriate exercise of the state's police power.

9/ Creighton v. Pragg, 21 Cal. 115 (1862); Shouse v. Quinley, 3 Cal. 3d 357, 45 P. 2d 70 (1935); Selby v. Oakdale Irrigation Dist., 140 Cal. App. 171, 35 P. 2d 125 (1934); McQuillan, Municipal Corporations, §§43.122 and 43.141, pp 691, 736 (citations thereto).

B.

Petitioners are entitled to recover damages for the taking of their security.

Petitioners acquired their security interest in Parcel 351 four years before the enactment of the Ordinance and eight years before they acquired title to their security. The core security provision for petitioners' bond was defendant Placer County's promise that the real property securing the bond could be subdivided for residential use and, hence, not rendered valueless by governmental action as is the present situation.10/ The acts of

10/ In U. S. Trust, supra, the United State Supreme Court suggested a parallel test for determining which contemporaneous state laws should be incorporated into a contract and, thus, protect the Contract Clause. After reviewing prior authority, the court characterized this test as a "particularized inquiry into the legitimate expectations of the contracting parties." Id. at 20, n. 17, 52 L. Ed. 2d at 108, n. 17. Was one of the Calls' "legitimate expectations" that the state would guarantee not to exercise its police power unreasonably so as to destroy completely the value of their security

(footnote continued)

respondent CTRPA and its co-defendants not only prohibited all reasonable and beneficial uses of Parcel 351, but then also denied access to all of the benefits derived from various public improvements which were constructed with the monies furnished by the petitioners. These improvements have already been built and are used by adjoining developed tracts. The effect of the Ordinance and continuing subdivision and other prohibitions[11/] is to restrict the use of Parcel 351 to open

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(footnote continued from previous page) without compensation? The answer must be yes.

11/ The past and continuing land use restrictions at Lake Tahoe prevent even the building of one house on Parcel 351's 30 acres of subdivision land. The Complaint alleges additional prohibitions on any residential use of the land, e.g. the sewer connection bans imposed by the California Regional Water Quality Control Board, Lahontan Region, and the North Tahoe Public Utilities District (CT pp. 9-10). In 1984, the plan of the Tahoe Regional Planning Agency, respondent's successor agency, extended the prohibition on subdivisions applicable to Parcel 351.

space, while leaving surrounding property free to enjoy the benefits of the public improvements constructed in the Kingswood West assessment district. Hence, respondent rendered Parcel 351 -- petitioners' security -- little more than a collection of public easements through which members of the public, and owners of adjacent tracts, run sewage, automobiles and utilities without compensation to the petitioners.

On the basis of these facts, the actions of respondent CTRPA and its co-defendants violated the following constitutional prohibitions:

1. The "taking" of property for which just compensation is due under the Fifth and Fourteenth Amendments ("takings" clause) of the U.S. Constitution by:

a. Taking petitioners' right to have their bond discharged through foreclosure

of the lien 12/ on the land. Thibodo v. United States, 187 F. 2d 249, 257 (9th Cir. 1951). 13/ It is apparent that the property rights in a bond arise not only from the lien on land, but also in the

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12/ Under California law, petitioners' street improvement bond was a lien on Parcel 351. Neary v. Peterson, 1 Cal. 2d 703, 37 P. 2d 82, 83 (1934). The lien for street improvement assessments "remains intact notwithstanding the sale of the property for delinquent taxes, the right of foreclosure on the bond can not be denied." Elbert v. Nolan, 32 Cal. 2d 610, 197 P. 2d 537 (1948) (Separate proceedings, establishing defendants as "owners" of the property based on titles correlative with respective tax liens, did not, destroy plaintiffs' rights flowing from bond liens to sue for partition); Monheit v. Cigna, 28 Cal. 2d 19, 168 P. 2d 965, 968-969 (1946).

13/ See El Paso v. Simmons, 379 U.S. 497, 533-534, 13 L. Ed. 2d 446, 85 S. Ct. 577 (1965) (Black, J., dissenting); Contributors to the Pennsylvania Hospital v. Philadelphia, 245 U.S. 20, 62 L. Ed. 124, 38 S. Ct. 35 (1917) (Contract rights are a form of property and as such may be taken for a public purpose provided that just compensation is paid). See also Louisville Joint Stock Bank v. Radford, 295 U.S. 555, 594-595, 55 S. Ct. 854, 865-866, 79 L. Ed. 1593, 1607 (1934) (property rights in a mortgage instrument).

maintenance of the security which makes the bond an acceptable investment for the rational investor.14/ Petitioners should, therefore, be entitled to seek damages in inverse condemnation for the taking of their security.15/

b. The denial of all use and "taking" of the special benefits of the public improvements for which petitioners

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14/ Penn Central Transportation Co. v. New York City, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978) (the economic impact of government regulation of land, especially the degree to which state action "frustrates distinct investment-backed expectations, may form the basis for a finding of a 'taking.'" Id at 127, 98 S. Ct. 2660, citing Pennsylvania Coal Co. v. Mahon, 760 U.S. 393, 43 S. Ct. 158, 67 L. Ed. 322 (1922).

15/ In San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621, 636-661, 101 S. Ct. 1287, 67 L. Ed. 2d 551 (1981), an apparent majority of this Court held the opinion that damages are recoverable for inverse condemnation arising out of excessive regulation. Id at 633-634, 101 S. Ct. at 1294-1295 (Rehnquist, J. conc. op.). See Martino v. Santa Clara Valley Water District, 703 F. 2d 1141, 1148 (9th Cir. 1983).

paid.16/

As a general principle, a municipality cannot constitutionally require a private property owner to pay for public improvements except to the extent that the improvements directly benefit the property.17/ This Court has held:

> The exaction from the owner of private property of the cost of a public improvement in substantial excess of the

16/ In Furey v. City of Sacramento, 24 Cal. 3d 862, 873, 157 Cal. Rptr. 684, 690, 598 P. 2d 844 (1979), the California Supreme Court held plaintiffs were constitutionally entitled to legal relief as a result of paying special assessments for governmentally-initiated public improvements and being precluded from any realistic access to the benefits of those improvements by enactment of an open space ordinance. Id. at 873, 157 Cal. Rptr. at 690. This court also held that the defendant was obligated to refund the money paid for the sewer system which the ordinance had rendered useless to the land in question. Id. at 878, 157 Cal. Rptr. at 693.

17/ Assessments for special improvements are lawful in California only if the assessed property receives a special benefit that corresponds with the amount of the assessment. Dawson v. Town of Los Altos Hills, 16 Cal. 3d 676, 681, 129 Cal. Rptr. 97, 99-100 (1976).

> special benefits accruing to him is, to the extent of such excess, a taking under the guise of taxation of private property for public use without compensation.
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> Norwood v. Baker, 172 U.S. 269, 279, 19 S. Ct. 187, 191, 43 L. Ed. 443 (1898).

This Court has reaffirmed this doctrine on numerous occasions over the years. 18/ The value of property and the rights protected by the 14th Amendment arise not from the mere possession of the property but rather from its use. Lake Country Estates v. Tahoe Regional Planning Agency, 440 U.S. 391, 99 S. Ct. 1171, 59 L. Ed. 2d 401 (1979). Government cannot impose a benefit upon Parcel 351 and later

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18/ See, e.g., Myles Salt Co. v. Iberia Drainage District, 239 U.S. 478, 36 S. Ct. 204, 60 L. Ed. 392 (1915) (assessment for drainage district); Gast Realty v. Schneider Granite Co., 240 U.S. 55, 36 S. Ct. 254, 60 L. Ed. 523 (1915) (assessment paved streets); Georgia Railway & Electric Co. v. Decatur, 295 U.S. 165, 55 S. Ct. 701, 79 L. Ed. 1365 (1935) (holding error for trial court to refuse evidence on disparity between assessment and benefit to property).

unconstitutionally withdraw all practical access to that benefit.

c. Denial of the use of the improvements specifically benefiting Parcel 351 and the simultaneous public use of the same benefits constitutes uncompensated physical occupation of the property.

By denying the petitioners permission to subdivide and use the improvements to Parcel 351 (i.e. the compensation for relinquishment of the power to exclude others from Parcel 351),[19] CTRPA created a pure public use of the property. It thereby transformed what would have been permissible uses of the sewer lines, roads and other improvements into uncompensated,

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19/ The power to exclude has traditionally been considered "one of the most essential sticks in the bundle of rights that are commonly characterized as property." Kaiser Aetna v. United States, 444 U.S. 164, 176, 100 S. Ct. 383, 391, 62 L. Ed. 2d 332 (1979); see Restatement of Property §7.

open and continuing intrusions by the public. Public uses that involve uncompensated physical intrusions or seizures are unconstitutional under the takings clause of the Constitution.20/

2. Respondent CTRPA and its co-defendant agencies denied petitioners equal protection of the laws.21/ Respondent

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20/ See, e.g., Portsmouth Harbor Land & Hotel Co. v. United States, 260 U.S. 327, 329-330, 43 S. Ct. 135, 136-137, 67 L. Ed. 287 (1922) (military use); Western Union Telegraph Co. v. Pennsylvania R.R., 195 U.S. 540, 567-571, 25 S. Ct. 133, 140-141, 49 L. Ed. 312 (1904) (telegraph lines); Loretto v. Teleprompter Manhattan C.A.T.V. Corp., 458 U.S. 419, 429-430, 102 S. Ct. 3164, 3172-3173, 73 L. Ed. 2d 868 (cable television).

21/ Among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are rights to acquire, enjoy, own, and dispose of property. Lynch v. Household Finance Corp., 705 U.S. 538, 92 S. Ct. 1113, 31 L. Ed. 2d 429, reh. den. 406 U.S. 911, 92 S. Ct. 1611, 31 L. Ed. 2d 822 (1972). In the context of zoning, enforcement of an ordinance -- even if otherwise valid, violates equal protection if the ordinance is applied or enforced with discriminatory intent or purpose. See Snowden v. Hughes, 321 U.S. 1, 8, 64 S., Ct. 397, 401, 88 L.

(footnote continued)

"spot zoned" Parcel 351[22/] and thereby created an irrational and discriminatory distinction between Parcel 351 and surrounding tracts.

C.

The doctrine of res judicata should not be expanded to justify the violation of bondholders' constitutional rights.

Under the doctrine of res judicata, "a final judgment on the merits bars further claims by parties or their privies based on the same cause of action." Montana v. United States, 440 U.S. 147, 153, 59 L. Ed. 2d 210, 99 S. Ct. 970 (1979). The lower courts' expansion of this doctrine,

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(footnote continued from previous page) Ed. 497 (1944); Scudder v. Greendale, 704 F. 2d 999, 1002 (7th Cir. 1983).

22/ Under California law, one permissible basis for attacking the validity of a zoning ordinance is that the zoning ordinance is "spot zoning". Viso v. State of California, 92 Cal. App. 3d 15, 22, 154 Cal. Rptr. 580, 584 (1979). Spot zoning involves "unique treatment contrary to like property in the same general location." Westborough Mall, Inc. v. City of Cape Giradeau, 532 F. Supp. 284 (E.D. Mo. 1981)

to preclude bondholders from litigating their claims when their security has actually been rendered worthless, is inapplicable to this case for the following reasons:[23]

(a) The issues are entirely different.

Petitioners, unlike most litigants seeking to avoid the bar of res judicata, do not merely assert a new ground for recovery on the same cause of action. Significantly, they also do not attack the validity of the prior judgment against the landowners in the prior action of Call v. Feher. The petitioner-bondholders seek recovery for the harsh and unreasonable restriction of rights to a different subject property, i.e. their bond

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23/ See Blonder-Tongue Labs v. University Foundation, 402 U.S. 313, 323-324. 91 S. Ct. 1434, 28 L. Ed. 2d 788, 796-797 (1971) (litigants who never appeared in a prior action may not be collaterally estopped without litigating the issue).

investment.[24] (See supra, at A. and B.)

(b) Petitioners and respondent were never adverse parties in the prior adjudication.

Different parties from the prior action oppose each other in this case. In the prior action, petitioners were former co-defendants of respondent CTRPA and later complete strangers to the cross-complaint by the landowners. (see discussion re "procedural history," supra).

(c) The bondholders have never been in privity as "successors in interest" to the landowner-litigants from the prior action.

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[24] In addition to the impairment of contract and inverse condemnation claims, petitioner-bondholders' complaint also sought relief for (1) breach of contract and conspiracy to induce breach; (2) unjust enrichment; (3) estoppel; (4) for deprivation their vested development rights; (5) writ of mandate; (6) violation of equal protection; and (7) declaratory relief.

In this case, petitioners' rights are based upon their status as municipal bondholders, not real estate purchasers or successors in interest to the former landowners. Petitioners' rights at issue here were not obtained through contractual relations with the landowners.25/

Thus, contrary to the appellate court's assertion, petitioners did not

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25/ Petitioners perfected a right granted to them by virtue of a municipal bond with the County of Placer pursuant to the California Improvement Act of 1911 and the California Municipal Improvement Act of 1913. The applicable law and the equities applying to municipal bondholders are completely different from those applying to purchasers of real property. For example, petitioners' rights are based on an agreement with the governmental entity, not on a sales agreement. While a purchaser takes real property subject to all pre-existing liens, a bondholder who exercises his security rights, takes the property clear of all other private interests whether arising before or after the bond was issued. (Sts. & Hy. Code §6555) Moreover, there is no contractual relationship at all between the bondholder and the owner of the real property which is the security for the payment of the municipal bond. Call v. Feher, supra, at 445, 115 Cal. Rptr. at 392.

acquire "an interest in the subject matter affected by the judgment through or under one of the parties, as by inheritance, succession, or purchase." (A6) (quoting Bernhard v. Bank of America, 19 Cal. 2d 807, 811, 122 P. 2d 892, 894 (1941) (emphasis added).26/ In fact, a bondholder's lien on a parcel of land has been held by the California Supreme Court to survive ownership of the land to which it attached. Wilson v. Beville, 47 Cal. 2d 852, 306 P. 2d 789, 791 (1957) (bondholder entitled to compensation for the taking of his security interest in

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26/ The bondholders' property interest was acquired before the commencement of the prior action in Call v. Feher and was concurrent with the landowners' interest. In any event, the ultimate transfer of title to Parcel 351 to petitioners was involuntary. Petitioners actually bid their bond during the public sale of the subject land. Title to Parcel 351 was transferred to petitioners only because there were no other bids for the worthless security.

condemned property).27/

The mischaracterization of the bondholder-petitioners as successors in interest denies them the opportunity to challenge the governmental invasion of their property interests. "Because res judicata may govern grounds and defenses not previously litigated, ... it is to be invoked only after careful inquiry." Brown v. Felsen, 442 U.S. 127, 132, 60 L. Ed. 2d 767, 772, 99 S. Ct. 2205 (1979). No published decision has held that a bondholder who takes title to land as a

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27/ In an analogous situation, a mortgagor's loss in litigation affecting the mortgaged property does not bind the mortgagee nor can the mortgagee bind the mortgagor. Chase National Bank v. City of Norwalk, 291 U.S. 431, 438, 54 S. Ct. 475, 78 L. Ed. 894, 899 (1934). "Neither party is allowed to jeopardize the security or ownership interests of the other through litigation any more than through conveyance, subsequent encumbrance, or like transactions." 18 Wright & Miller, Federal Practice & Procedure, §4461, p. 543 (1981). The foregoing principles should apply to special assessment bonds, since "similar security relationships are governed by the same rule." Id. at fn. 2.

result of an landowner's default on bond assessments is a "successor in interest." If this proposition is permitted to stand, virtually no bondholder could defend his rights to the value of his security in land. States would be free abrogate any security provision and impair any municipal bond secured by real property simply by imposing land use regulations on landowners.

(d) There has been no final judgment on the merits of petitioners claims.

As indicated previously (see "Statement of Case -- procedural history," supra), petitioner-bondholders' claims in this case (see fn. 24, supra.) were neither alleged nor litigated[28/] by any

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28/ In Mercoid Corp. v. Mid-Continent Investment Co., 320 U.S. 661, 671, 88 L. Ed. 376, 384, 64 S. Ct. 268 (1944) the Court stated:

> ...[W]here the second cause of action between the parties is upon a different claim the prior judgment is res judicata

(footnote continued)

of the parties in the prior action of Call v. Feher.[29] Moreover, this case is based on new facts that occurred after petitioners foreclosed on their security and attempted to recover their bond investment which altered their legal rights and relations to the defendant governmental agencies.

(footnote continued from previous page)
not as to issues which might have been tendered but only as to those matters in issue or points controverted, upon the determination of which the finding of the verdict was rendered."

[29] Call v. Feher held that the landowners could not have raised and litigated plaintiffs' potential claims against CTRPA. ("The only true contract is the bond between the issuing entity and the bondholder." Call v. Feher, supra, at 441, 155 Cal. Rptr. at 390.") Second, the landowners, had no special agreement or bondholder status with defendant Placer County to enforce. See e.g. Amador Valley Joint Unified High School District, etc. v. State Board of Equalization, 22 Cal. 3d 208, 242, 149 Cal. Rptr. 239, 255, 583 P. 2d 1281, 1297 (1978) (petitioners were not injured bondholders). Thus, the rights of the bondholders as against CTRPA were not even at issue in the prior action.

(e) The denial of a right to hearing in the context of this case is a violation of the due process process rights of bondholders.

The appellate court refused to face squarely the issues posed by petitioners' action and misapplied the res judicata doctrine. In effect, the lower courts held incorrectly that government can impair the bondholders' interests by simply litigating its land use regulations with landowners. To make the prior adjudication binding on petitioners would yield the absurd result of leaving all bondholders without a remedy or protection against the non-repayment of their bond. The preclusive effect of the judgment (against the landowners) in Call v. Feher raises serious due process questions.30/

30/ The Court traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect

(footnote continued)

D.

The res judicata decision subverts the integrity of municipal finance.

There is no indication that the CTRPA gave any consideration to the effect that its ordinance might have on holders of special assessment bonds or the possibility of using alternative, less drastic means of accomplishing its goal

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(footnote continued from previous page) their property or as plaintiffs attempting to redress grievances. Logan v. Zimmerman Brush Co., 455 U.S. 422, 455, 102 S. Ct. 1148, 1154, 71 L. Ed. 2d 265, 273 (1982). A state, moreover, may not finally destroy a property interest without first giving the putative owner an opportunity to present his claim of entitlement and without appropriate procedural safeguards. Id. at 434, 102 S. Ct. at 1157, 71 L. Ed. 2d at 276-277; See Vitek v. Jones, 445 U.S. 480, 490-491, n. 6, 100 S. Ct. 1254, 63 L. Ed. 2d 552 (1980).

See also Boddie v. Connecticut, 401 U.S. 371, 380, 91 S. Ct. 780, 28 L. Ed. 2d 113 (1971). (states prevented from denying litigants' use of adjudicatory procedures and an opportunity to be heard); Societe Internationale v. Rogers, 357 U.S. 197, 209, 78 S. Ct. 1087, 2 L. Ed. 2d 1255 (1958) (constitutional limitations on the courts' power to dismiss an action without affording a party a hearing on the merits of his case).

(i.e., to balance the interests of the bondholders with the interests of the public). California and federal law condemn such conduct by public entities.31/ Nevertheless, the California courts uncritically approved the elimination of the bondholders' security. It, therefore, foreclosed irrevocably the possibility that petitioners protected, contractual expectations arising from the bond could be realized.

In this case, the effect of defendant CTRPA's subdivision moratorium is no less drastic than if the Ordinance had suspended the right to collect interest or principal when due. The enactment of the

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31/ See generally Thomas R. Hurst, "Municipal Bonds and the Contract Clause: Looking Beyond United States Trust Company v. New Jersey," 5 Hastings Constitutional Law Quarterly 25 (1978); Comment, "The Contract Clause: Is There Life After Death," 30 Baylor Law Review 191 (1978); Comment, "Alteration of Rights in California Public Securities," 53 California Law Review 1081 (1965).

Ordinance and its retroactive application to petitioners' security, constitutes a threat to the stability of the market for municipal debt obligations. The plenary power of the state does not extend to or include the right to "trench upon private rights arising out of or based on contracts." Sutter Basin, 40 Cal. 2d 235, 253 P. 2d 649, 652 (1953). Without the rigorous protection of minority rights, which the constitutional prohibition against the impairment of contracts provides, the security of the terms of public bond issues would be difficult to assure. Thomas R. Hurst, "Municipal Bonds and the Contract Clause: Looking Beyond United States Trust Company v. New Jersey" 5 Hastings Constitutional Law Quarterly 25, 26 (1978).

The political reluctance of state legislatures to raise taxes and the temptation to interfere with pre-existing

contractual obligations has been recognized by both the California and United States Supreme Courts.

> If a state could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protections at all....[A] state cannot refuse to meet its legitimate financial obligations simply because it would prefer to spend the money to promote the public good rather than the private welfare of its creditors....[A] state is not completely free to consider impairing the obligations of its own contracts on a par with other policy alternatives. Similarly, a state is not free to impose a drastic impairment when an evident and more moderate course would service its purposes equally well.
>
> United States Trust, supra. at 26, 29, 30 - 31, 97 S. Ct. at 1520 - 1522, as quoted in Sonoma County Organization of Public Employees v. County of Sonoma, 23 Cal. 3d 296, 152 Cal. Rptr. 902, 541 P. 2d 1 (1979)

To uphold the dismissal of this case on res judicata grounds would permit the

state -- under the guise of land use regulations -- to redefine the nature of any plaintiff's security provision as "non financial" and escape responsibility for its public bond obligations. A governmental entity can always find a use for extra money, especially when taxes do not have to be raised." United States Trust, supra. at 26, 97 S. Ct. at 1519, 52 L. Ed. 2d at 112. The substantial deprivation or encroachment of valuable bond contract rights would hardly benefit states in the long run. Comment, "How Not to Contest Special Assessments in California," 17 Stanford Law Review, 256 (1965).

In sum, significant questions of law are posed by this unwarranted extension of the Call v. Feher decision. Call v. Feher never addressed the situation where government has breached its obligation not to substantially alter bondholders'

security so as to render it totally valueless. The rights of bondholders who take title by virtue of their liens on real property security must be clarified in view of the use of the Call v. Feher decision to bar bondholders' claims. Hence, petitioners should at least be permitted to prove their claims before a trial court.

There exists a need for a proper balance between the rights of bondholders and the public need for proper land use control. See Agins v. City of Tiburon, 24 Cal. 3d 266, 275-276, 157 Cal. Rptr. 372, 377 (1979), aff'd, 447 U.S. 255, 100 S. Ct. 2138, 65 L. Ed. 2d 106 (1980). Such a balance remains to be struck here.

The granting of relief to petitioners could help serve long range conservation goals and to "socialize the burden" on petitioners which should be borne by society as a whole. In the long run, Lake

Tahoe is more endangered by the philosophy of taking something for nothing than of paying for what is taken. If Parcel 351 is truly vital as open space at Tahoe, then it should be taken and paid for. If not (as petitioners are prepared to show), then it is patently unfair to charge petitioners with the double price of paying for the public facilities and for the open space. This approach only stirs up justified community resentments against "conservation" that sooner or later will expose Lake Tahoe to irreversible degradation.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should

be granted.

Respectfully submitted,

NICHOLS, DOI & RAPAPORT,

ALAN H. NICHOLS
Counsel for Petitioners

APPENDIX A

IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA
IN AND FOR THE THIRD
APPELLATE DISTRICT
(Placer)

FILED
FEB 23, 1984
COURT OF APPEAL - THIRD DISTRICT
WILLFRIED J. KRAMER, Clerk

EVERARD C. CALL and BETH S. CALL,	)	3 Civ. 22759
Plaintiffs and Appellants,	)	(Super. Ct. No. 59255)
v.	)	
CALIFORNIA TAHOE REGIONAL PLANNING AGENCY, et al.,	)	
Defendants and Respondents.	)	

Everard C. and Beth S. Call appeal from an order of the trial court sustaining without leave to amend the demurrer of California Tahoe Regional Planning Agency (CTRPA) to the Call's complaint. Such an order is nonappealable; appeal lies only from a subsequent judgment of dismissal. (6

Witkin, California Procedure, Appeal, §68, subd. (a), P. 4082.) However, it is obvious to us the trial court intended a final ruling, and CTRPA was entitled to an order of dismissal. As the Court of Appeal stated in Wilson v. Household Finance Corp. (1982) 131 Cal.App.3d 649, 651-652, "It would be a waste of judicial resources to require dismissal of the appeal, to be followed by the entry of an order of dismissal in the trial court and another appeal. In such circumstances it has been held the appellate court may modify the order to make it a judgment and construe the notice of appeal to apply to that judgment. (E.g., Nystrom v. First Nat. Bank of Fresno (1978) 81 Cal.App.3d 759, 763, 768 [146 Cal.Rptr. 711]; 6 Witkin, Cal. Procedure (2d ed. 1981 supp. to vol. 6) Appeal, §§49, 337, pp. 13, 54-55.)"

The Calls filed an extensive challenge

to CTRPA's ordinance restricting subdivision of the Call's 30-acre lot at Lake Tahoe. The trial court sustained CTRPA's demurrer on the ground the claims in the complaint were barred by the doctrine of res judicata, and specifically by the judgment in a prior action that we upheld in Call v. Feher (1979) 93 Cal.App.3d 434, referred to hereinafter as the prior action. We modify the order sustaining the demurrer to include a judgment of dismissal, and otherwise uphold the judgment of the trial court. The present action is barred by res judicata.

FACTS

Most of the pertinent preliminary facts we set forth in Call v. Feher, supra, 93 Cal.App.3d 434, 438-439. In that case, the Calls had filed an action to foreclose on a street improvement bond they purchased from Placer County in the

face amount of $98,867.54. (Id., at p. 438.) Payments on the bond were secured by a parcel of real property, parcel No. 351, a portion of the Kingswood West Assessment District in the Placer County section of the Lake Tahoe region. (Ibid.) The previous owners of the property claimed a CTRPA Land Use Ordinance restricting subdivision of that parcel resulted in commercial frustration of the object of the bond agreement, and thus excused their default in paying bond assessments. They also cross-complained against CTRPA. the Calls and Placer County, seeking a declaration that the affected property should have a vested right to effect a subdivision, and challenging the constitutional validity of the subdivision restrictions. (Call v. Feher, supra, 93 Cal.App.3d 434, 439-440.)

CTRPA filed a general and special demurrer to the cross-complaint, and the

trial court sustained the demurrer without leave to amend. Thereafter, the trial court granted the Calls' motion for summary judgment of foreclosure, and made an order of sale. (Id. at p. 438.) The trial court found the CTRPA Land Use Ordinance restricting subdivision was constitutionally valid, and that the previous landowners had no vested right to subdivide. On appeal in those actions, we consolidated the previous landowners' appeal from the judgment of dismissal arising from the sustaining of the demurrer and the appeal from the summary judgment on the bond foreclosure, and we affirmed the judgments of the trial court. (Id. at pp. 439, 446.)

Subsequent to that action, the Calls purchased the property at a sheriff's sale for $96,449.90, slightly more than the amount of the judgment plus interest ($95,455.11) in the prior action. The

sheriff's deed was recorded November 7, 1979. In March 1981 the Calls filed the present action in which they seek damages of $1.5 million, alleging the actions of CTRPA in enacting the land use ordinance prohibiting subdivision of the parcel "damaged, confiscated and took plaintiffs' real property. . . ." They complain the subdivision restriction impairs an alleged contract between them and the County arising from the bond purchase. Additional causes of action include claims for breach of express or implied contract, equitable estoppel, detrimental reliance, unjust enrichment, vested rights to subdivide, relief based on an alleged unconstitutional limitation of the Calls' use of the parcel, equal protection violations, and others. On February 2, 1983, the trial court found the Calls' entire action was barred by the doctrine of res judicata and the court did not

reach the other grounds upon which CTRPA challenged the complaint. The trial court sustained without leave to amend CTRPA's demurrer, and this appeal ensued.

DISCUSSION

We examine whether res judicata bars the Calls' action against CTRPA. Because the facts are undisputed and the appeal concerns solely questions of law, we may make a final determination in accordance with applicable principles of both statutory and common law. (Dunning v. Dunning (1952) 114 Cal.App.2d 110, 115; 5 Cal.Jur.3d, Appellate Review, §529, at pp. 220-221.)

"[R]es judicata gives conclusive effect to a former judgment in subsequent litigation involving the same controversy. (4 Witkin, California Procedure, Judgment, §147, p. 3292 (2d ed. 1971; emphasis in original.) The doctrine is embodied in Code of Civil Procedure section 1908,

subdivision (a)(2): "[T]he judgment or order is, in respect to the matter directly adjudged, conclusive between the parties and their successors in interest by title . . . ."

In the prior action, the previous landowners complained the CTRPA ordinance restricting subdivision was unconstitutional, deprived them of a vested right to subdivide, destroyed the value of bond-financed improvements on the property, and resulted in a frustration and failure of consideration of the bond contract. As we have noted, the trial court rejected those claims, and we upheld the trial court in Call v. Feher, supra, 93 Cal.App.3d at p. 443.

The present action is a restoration of the same claim for relief advanced by appellants' predecessors in title, arising from the exact same harm alleged to have occurred in the prior action, i.e.,

inability to subdivide because of the CTRPA ordinance. The Calls reassert the same causes of action for vested rights, frustration of contract and declaratory relief that were conclusively decided against the former landowners of the same parcel.

The Calls assert this action is different, in part because it does not concern bondholders and the obligations of municipal bondholders. The facts do not support the assertion. A careful examination of the complaint indicates the claims against CTRPA are based on the effect of the ordinance on the property as owned by the Calls. Their claim that their vested rights are based on their contractual interests (none of which are clearly asserted), and not on common law property rights, is nonsensical at best. As bondholders, they had no rights to subdivide property that was security for

payments on the bond. As landowners they might assert such rights, but the Calls are precluded from doing so because their precedessors (sic) in the title litigated the issues and lost.

The Calls contend res judicata is inapplicable to the present action because it does not involve the same parties or persons in privity with them. We think the significant question here is whether there was sufficient privity between the previous landowners and the Calls, regardless of the Calls' status as parties or as bondholders in the prior action. The most common form of privity exists with successors in interest by title, as codified in Code of Civil Procedure section 1908, quoted above. A privy has been defined as "one who, after rendition of the judgment, has acquired an interest in the subject matter affected by the judgment through or under one of the

parties, as by inheritance, succession or purchase." (Bernhard v. Bank of America (1942) 19 Cal.2d 807. 811.) Since we hold the Calls are suing as landowners and not bondholders, they come to the present case in the shoes of the previous landowners who asserted the same challenges to the CTRPA ordinance and lost.

The Calls somewhat inconsistently maintain they sue as bondholders and yet admit their rights to sue CTRPA did not mature until they had obtained title to the land. their standing as bondholders in the prior action is immaterial to the question of the application of res judicata. They are currently the landowners and cannot re-litigate the same issues adjudicated against the previous landowners.

The Calls claim they acquired their interest in the property before the commencement of the prior action, and

thus, cannot be successors in interest within the meaning of Code of Civil Procedure section 1908, subdivision (a)(2). (See Holman v. Toten (1942) 54 Cal.App.2d 309, 314.) It is true the Calls obtained a security interest in the land prior to commencement of the prior action; however, they obtained ownership interest in the land subsequent to judgment in the prior action and now they assert claims which are the claims of landowners. Holman is inapposite because it concerns a party whose title to the property vested before suit was commenced. (Id., at pp. 314-315.) Therefore, the interest on which the Calls base their claims was acquired subsequent to the judgment in the prior action, not prior to its commencement, and thus, res judicata will properly apply.

We also examine the question of whether it is fair to identify the Calls

as successors in interest by title in light of the policy barring such persons from asserting the claims of their predecessors in title. "The question of fairness appears to be resolved in terms of whether a successor to the kind of property involved could reasonably have anticipated that it might have been the subject of a judgment of the type in question." (Rest. 2d, Judgments §43, com. a, at p. 7.) There is no question the Calls could have anticipated the judgment in the prior action; they were in fact parties in a different capacity, and they acquiesced in that part of the judgment which upheld the validity of the CTRPA ordinance in restricting subdivision of the parcel.

In this case, the land use ordinance affected only the property and not the legal obligations under the bonds. (Call v. Feher, supra, 93 Cal.App.3d at p. 434;

see Northwestern National Life Insurance Co. v. Tahoe Regional Planning Agency (9th Cir. 1980) 632 F.2d 104.) Nothing CTRPA did prevented the parties having obligations under the bond from completing their respective obligations. There is no controversy here as to the impairment of any contract or bond obligation. Each claim put forth by the Calls refers to the effects of the ordinance on the real property owned in fee by the Calls.

The Calls assert a number of legal theories for relief, including damages of $1.5 million for inverse condemnation, declaratory relief, infringement of contract, vested rights and others. However, in both the prior action and this one, the landowners asserted the same primary right, involving the same property and the same ordinance. As the trial court found, "both actions seek recovery for benefits denied by reason of the

devaluation of the subject property due to the enactment of the subject ordinance." The invasion of one primary right gives rise to but one cause of action. (Slater v. Blackwood (1975) 15 Cal.3d 791, 795.) Once injury gives rise to only one claim of relief, regardless of whether different legal grounds for relief are presented. (Ibid.) As the trial court in the instant case noted: "Although the cross-complaint in the prior action and the complaint in the pending action both seek different remedies for the stated harm [declaratory relief in Call v. Feher; damages in the present], they each allege a violation of the right to be free from unjust or unreasonable restrictions that affect property rights." The reasoning of the trial court is correct.

Res judicata not only settles issues actually litigated in the prior action, but also all issues that might have been

raised and litigated in the action. (Mattson v. City of Costa Mesa (1980) 106 Cal.App.3d 441, 446.) Fairness does not demand we ameliorate this doctrine, since the Calls were parties in the prior action and they had opportunity to litigate certain issues, file cross-complaints, or take other measures to protect their interests. Clearly, they had more such opportunity than a purchaser who, even with knowledge of the prior action, was not a party to it.

The order is modified to include a judgment of dismissal. As modified, the judgment is affirmed.

REGAN, Acting P. J.

We concur:

EVANS, J.

BLEASE, J.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF PLACER

Date: February 2, 1983, Department 2
Present Hon. J. Richard Couzens, Judge
Sharyn Veiga, Deputy Clerk

EVERARD C. CALL and BETH S. CALL,	)	
Plaintiffs,	)	No. 59255
v.	)	
CALIFORNIA TAHOE REGIONAL PLANNING AGENCY, et al.,	)	
Defendants.	)	

Nature of Proceedings: Demurrer

MINUTE ORDER

Defendant CTRPA has interposed a multifaceted demurrer to the complaint. Without reaching all of the issues raised by the demurrer, the Court concludes that the present action must be barred by the doctrine of res judicata. Both sides have extensively briefed and discussed the law potentially applicable to these proceedings. The Court finds that the claim asserted in the action of Call vs.

Feher, resulting in the appellate decision reported at 93 Cal.App.3d 434, was the same primary right as asserted in the present action. Both actions involve the same ordinance adopted by defendant and both actions seek recovery for benefits denied by reason of the devaluation of the subject property due to the enactment of the subject ordinance. Although the cross-complaint in the prior action and the complain in the pending action both seek different remedies for the stated harm, they each allege a violation of the right to be free from unjust or unreasonable restrictions that affect property rights. Assuming the application of the doctrine of res judicata to the present proceedings, the doctrine will not only settle issues that were actually litigated in the prior action, but also all issues that might have been raised and litigated in the action. Mattson vs. City

of Cost Mesa (1980) 106 Cal.App.3d 441, 446. Accordingly, the slight variation in approach between the two actions is not dispositive.

Plaintiff contends that res judicata is inapplicable to the present proceedings since the present case does not involve the same parties or persons in privity with them. Code of Civil Procedure §1910 defines like parties as those who "were on opposite sides in the former case". An exception to this rule lies where the parties are actually opposed to each other and litigate issues adverse to each other. See Pomona College vs. Dunn (1935) 7 Cal.App.2d 227. It is quite true that in the prior action Call and CTRPA were co-defendants in the cross-complaint. In actual fact, however, the parties did not have a unity of interest. A finding of the validity of the CTRPA ordinance would be adverse to the interests of cross-

defendant Call. In this context, Call and CTRPA were actually antagonistic to each other in the prior action and are certainly antagonistic to each other in the present action.

Even if the parties to the present action were not actually adverse in the previous action, the principles of res judicata may still apply if there is sufficient privity between the parties. The most common form of privity exists with successors in interest, as in the subsequent acquisition of property previously subject to litigation. Dillard vs. McKnight (1949) 34 Cal.2d 209; Bernhard v. Bank of America (1942) 19 Cal.2d 807. Although plaintiffs argue that no privity exists by reason of their different standings in the two lawsuits (bondholders vs. property owners) and that their interest was acquired prior to judgment in the previous action, the

argument ignores the simple fact that they are bringing the present action as a successor to the title of the property in question and that a judicial decision has been made regarding the property in a previous action. They are, in fact, in privity with the prior landowner. Recent case law has expanded the concept of privity so as not to require actual identity of the parties but to include consideration of the practical realities of the situation. "The question is whether the non-party is sufficiently close to the original case to afford application of the preclusion." People ex rel. State of California vs. Drinkhouse (1970) 4 Cal.App.3d 931, 937.

In order for the doctrine of res judicata to apply, the prior litigation must have been resolved on the merits. The question involves a factual determination if the previous case was

resolved by demurrer. Plaintiffs assert that the prior case was resolved by the Appellate Court determining that the cross-complaint in the prior action should be dismissed for failure to exhaust administrative remedies. Plaintiffs' interpretation of the appellate decision is unreasonably restrictive. It is true that the Court did hold that the plaintiffs had not exhausted their administrative remedies. The appellate court also held, however, that the second amended cross-complaint did not allege a proper cause of action for declaratory relief; that there was no vested right to subdivide the property; that although imposition of the land restriction may have devalued the property, the obligations under the bond were not relieved; and that the doctrine expressed in Eldridge vs. Burns (1978) 76 Cal.App.3d 396 did not apply. The effect of the

ultimate determination by the Appellate Court was to resolve the case on its merits.

For the foregoing reasons, defendant's demurrer is sustained without leave to amend.

ORDER DENYING HEARING
AFTER JUDGMENT BY THE COURT OF APPEAL

3rd District, Civil No. 22759

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SUPREME COURT
FILED
MAY 23, 1984
Laurence P. Gill, Clerk

IN BANK

CALL et al.

v.

CALIFORNIA TAHOE REGIONAL PLANNING AGENCY et al.

Appellants' petition for hearing DENIED.

The request for an order directing publication of the opinion in the above entitled cause is DENIED.

Bird, Chief Justice

APPENDIX B

CALIFORNIA TAHOE
REGIONAL PLANNING AGENCY

LAND USE ORDINANCE

****

Section 5.13 Residential Subdivision, Lot Splitting and Parcel Division Restriction

The Agency shall not consider or approve any proposal for subdivision, minor subdivision, lot split, or parcel division for residential development except that minor subdivisions and lot splits may be considered if they do not increase density or coverage from that which would be authorized in the absence of the split. The criteria for terminating this restriction include a requirement that the Agency make findings that

(a) 85% of the vacant parcels of record as of August 29, 1975, within the

subregion have been utilized for the construction of at least one dwelling unit or allowable commercial structure. Furthermore, once the 85% build out level has been attained, before any subdivisions, PUD's or any other residential development except a single family house on any existing lot or parcel of record can be approved, findings must be made by the Agency that any such approvals would be consistent with the environmental constrains of the region , and that the goals of the land capability, water quality, air quality, and scenic beauty elements of the land use plan, the goals of the transportation, conservation, and public services and facilities plans, have been attained, and will be maintained if further subdivision is authorized.

In addition, if the subdivision restriction be terminated, the Agency shall require, among other things, that:

The residential development authorized be confined to a minimum portion of the parcel authorized for development, to keep impervious surface coverage, land and vegetation disturbance, and roads and sewers to a minimum.

(b) The planning subregions for purposes of this policy are as follows:

Subregion #1. Northshore, including all of the CTRPA jurisdictional area north of the TTSA southern boundary.

Subregion #2. Southshore, including all CTRPA jurisdictional area south of the TTSA boundary.

(c) For purposes of this policy, a parcel is defined as any vacant legal parcel of record as of August 29, 1975 which is more than 2,500 square feet in area. Parcel expressly includes, but is not limited to, any vacant legal lot which is located within a residential subdivision as of August 29, 1975.

(d) An inventory/census of vacant parcels as defined above will be established by the CTRPA staff and will be revised every two years for purposes of making necessary determinations.

****

Office - Supreme Court, U.S.
FILED
SEP 27 1984
ALEXANDER L. STEVAS
CLERK

No. 84-291

In The

Supreme Court of the United States

October Term, 1984

EVERARD C. CALL and BETH S. CALL,

Petitioners,

vs.

CALIFORNIA TAHOE REGIONAL PLANNING AGENCY,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeal of the State of California Third Appellate District

RESPONDENT'S BRIEF IN OPPOSITION

JOHN K. VAN DE KAMP, Attorney General of the State of California

N. GREGORY TAYLOR, Assistant Attorney General

MICHAEL L. CROW, (Counsel of Record) Deputy Attorney General

1515 K Street, Suite 511
Sacramento, California 95814
Telephone: (916) 324-5500

Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Where a state court applying state law decides that a complaint purporting to raise federal questions is barred by the doctrine of res judicata, does this Court have jurisdiction to review such a state law decision on a writ of certiorari?

2. Does petitioners' conclusory allegation that the challenged land use ordinance has taken their property without just compensation present a substantial federal question in light of this Court's decision in *Agins v. City of Tiburon,* when the ordinance on its face permits development and petitioners have made no application for any use whatever?

3. Does petitioners' allegation that the challenged subdivision restriction impairs alleged obligations of municipal bonds present a substantial Contract Clause issue, when, a) respondent was not a party to the bond obligation, b) the ordinance, an exercise of the police power, by its terms regulates only subdivision of land, c) both state and federal courts construing the same and similar bond agreements have found no contract impairment?

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No. 84-291

In The

Supreme Court of the United States

October Term, 1984

EVERARD C. CALL and BETH S. CALL,

Petitioners,

vs.

CALIFORNIA TAHOE REGIONAL PLANNING AGENCY,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeal of the State of California Third Appellate District

RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The opinions of the Court of Appeal of the State of California, Third Appellate District, and the Superior Court of the State of California in and for the County of Placer are unreported. The opinions are reproduced in Appendix A of the Petition for Writ of Certiorari.

JURISDICTION

Petitioners seek to invoke this Court's jurisdiction under 28 United States Code section 1257 subdivision (3). For the reasons set forth *infra,* this Court lacks jurisdiction to consider the questions raised in the petition.

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCE INVOLVED

1. For purposes of the jurisdictional question, consideration of 28 United States Code section 1257 subdivision (3) is required:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> ". . . . . .
>
> "(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specifically set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

2. Respondent will make reference to the Contract Clause (Article I, Section 10), and the Fifth and Four-

teenth Amendments to the United States Constitution, quoted at page four of the petition for writ of certiorari, only to show that no substantial question involving these constitutional provisions is present in this case.

3. As applied in the proceedings below, the doctrine of res judicata is embodied in California Code of Civil Procedure, section 1908, subdivision (a) (2): "[T]he judgment or order is, in respect to the matter directly adjudged, conclusive between the parties and their successors in interest by title subsequent to the commencement of the action or special proceeding, litigating for the same thing under the same title and in the same capacity, provided they have notice, actual or constructive, of the pendency of the action or proceeding."

4a. Section 5.13 of respondent's Land Use Ordinance, which is an interim restriction on subdivision of land, and which petitioners claim is unconstitutional, is set forth in Appendix B to the Petition for Writ of Certiorari.

b. In addition, respondent will make reference to the land use classifications found in sections 7.11, 7.15-7.25 of its Land Use Ordinance, the text of which is set forth in the Appendix hereto.

———o———

STATEMENT OF THE CASE

A. Creation and Nature of Respondent CTRPA

Respondent California Tahoe Regional Planning Agency ("CTRPA"), throughout the course of this liti-

gation in the state courts, was a political subdivision of the State of California.[1]

It was created by the California Legislature as a regional land use planning agency to address the difficult land use and ecological problems existing in the California portion of the Lake Tahoe basin. (See generally, *People, ex rel. Younger v. County of El Dorado* (1971) 5 Cal.3d 480, 485-490, 96 Cal.Rptr. 553, 554-558, 487 P.2d 1193, 1194-1198; *Raley v. California Tahoe Regional Planning Agency* (1977) 68 Cal.App.3d 965, 971-972, 137 Cal.Rptr. 699, 702-703.)

Pursuant to its enabling legislation (Cal.Gov. Code section 67000, et seq.), CTRPA adopted a general plan and land use ordinance in 1975, and from then until its deactivation, CTRPA exercised regulatory permitting authority over land development projects within its jurisdiction.

Section 5.13 of CTRPA's ordinance (Pet.App. B), the subject of both petitioner's constitutional challenge as

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1. CTRPA ceased to exist on April 26, 1984, by operation of law, pursuant to the terms of California Government Code section 67131 (West 1983), upon the adoption by the bi-state Tahoe Regional Planning Agency of ordinances implementing the revised Lake Tahoe Regional Plan, in accordance with the Tahoe Regional Planning Compact. (Pub. L. No. 96-551, 94 Stat. 3233 (1980); Cal. Gov. Code section 66801, et seq. (West supp. 1984). Pursuant to California Government Code section 67132, the Secretary of the California Resources Agency is the legal successor to CTRPA for the sole purpose of winding up the affairs of the agency. The Secretary's powers include the ability to carry on with the agency's pending litigation to the same extent and in the same manner as the agency. (Cal. Gov. Code section 67132 subdivision (b) (3) (West 1983).) Although respondent refers to CTRPA's ordinance in the present tense, enforcement of the ordinance ceased on the date of the agency's deactivation. (Cal. Gov. Code sec. 67131, *supra*.)

well as that of their predecessors in title in the prior action, *Call v. Feher* (1979) 93 Cal.App.3d 434 [155 Cal.Rptr. 387], temporarily prohibits new subdivision of land until 85 per cent of existing parcels are built upon. "The need for this interim constraint on the creation of additional lots is explained in the [CTRPA] regional plan as being due to the dramatic and excessive creation of new lots during the years 1950-1971 and the resulting potential for massive population growth harmful to the environmental quality of the [Lake Tahoe] basin." *(Call v. Feher, supra,* 93 Cal.App.3d at p. 442, 155 Cal.Rptr. at p. 390.)

Contrary to petitioners' statements that they are prohibited from any residential use of their land, their complaint in the state trial court admits the land is zoned residential by CTRPA as well as by Placer County.[2] Sec-

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2. Petitioners' Complaint, p. 8, paragraphs 28 and 29:

"28. From on or about September 19, 1975, to date, significant land-use planning and policy determinations were made by Defendants relative to the Tahoe area, in general, and the subject property, in particular. Said governmental determinations specified and mandated that the area would be used for single-family residences.

"29. No dwelling units, residences, or other structures have ever been constructed upon Plaintiffs' subject property although, at the present time, Plaintiffs wish and intend to have the subject property developed for residential use, as generally specified in the Land Use Plan described above, as allowed under zoning of the Defendant COUNTY and as contemplated and agreed between the Defendant COUNTY and Plaintiffs at the time of the sale of the said bonds. The use of Plaintiffs' property for residential purposes is the highest and best use of that property, and entirely consistent with the understandings of the parties. The facilities constructed by the Assessment District were *sized* and *engineered* for the purpose of providing those improvements to subdivided lots in the subject property."

tions 7.11 and 7.15-7.25 of CTRPA's ordinance (Resp. App.), establishing land use districts, demonstrate that residential use, if not new subdivisions, is permitted in all residential zoning categories.

B. The Relationship of Call v. Feher to the Present Case.

Call v. Feher (1979) 93 Cal.App.3d 434, 155 Cal.Rptr. 387, is the "prior action" which forms the basis for the state courts' application of res judicata as a bar in the present case.

Call v. Feher involved the same parcel of land and the same CTRPA ordinance challenged in the present case, and both CTRPA and petitioners in this case were parties. The case was an action under California municipal bond law by the Calls to foreclose on a municipal improvement bond purchased from Placer County and secured by the parcel upon which the bond financed improvements were constructed. Defendant bond obligors and landowners, the Calls predecessors in title, defended the foreclosure action and cross-complained against the Calls and CTRPA, asserting the CTRPA subdivision restriction unconstitutionally destroyed the value of the bond financed improvements without compensation, deprived them of a vested right to subdivide, unconstitutionally impaired the contractual obligation of the assessment bonds, and resulted in commercial frustration of the bond agreement, thereby excusing their default in paying bond assessments.

The trial court entered judgment in favor of the Calls and CTRPA, and the state court of appeal affirmed, rejecting the previous landowners' arguments regarding the

CTRPA subdivision restriction. *(Call v. Feher, supra,* 93 Cal.App.3d 434, 443-446, 155 Cal.Rptr. 387, 391-393.)

In their successful bond foreclosure action, the Calls actively supported the validity of the CTRPA ordinance as applied to the previous landowners, arguing *inter alia* that the CTRPA ordinance did not interfere with the bond obligation or otherwise injure the landowners because the property was zoned residential and could be used for that purpose, and because the landowners had received the value and the benefit of the bond assessments despite the CTRPA ordinance.

C. The Present Case

After the successful termination of their bond foreclosure action, petitioners purchased the property at the judicially ordered sale. Soon thereafter, petitioners filed the present action against CTRPA. This time, petitioners sought to change their position with respect to the validity of CTRPA's ordinance. The focus of their attack was the same issue as previously litigated, i.e., the effect of the subdivision restriction on the bond obligation, except now they were asserting the position they previously attacked.

In essence, the complaint in the present action alleges petitioners' real property has been taken without compensation in violation of the Fifth and Fourteenth Amendments as a result of the subdivision restriction, and that said restriction, in violation of the Contract Clause, impairs the obligation of an alleged implied contract permitting subdivision between petitioners and Placer County arising from their purchase of the improvement bond issued by the County.

Although petitioners' complaint makes allegations to the effect that the property can only be used if subdivided, the complaint does not, and cannot allege that CTRPA ever imposed such a requirement. Nor does the complaint allege, nor could it, that petitioners ever applied to CTRPA for permission for a specific residential development. They in fact have not. The complaint itself admits the property is zoned for residential use. As sections 7.11, 7.15-7.25 of CTRPA's ordinance demonstrate, some residential development is permitted in all residential classifications. (Resp. App.)

The trial court sustained CTRPA's demurrer without leave to amend on grounds of res judicata and entered judgment dismissing the action, and the state appellate court affirmed. The Court of Appeal compared the landowners' claims against the CTRPA ordinance in *Call v. Feher* with the allegations in petitioners' complaint, and found them to be substantively identical and based on the same asserted right as landowners to be free of the subdivision restriction. (Pet.App. A-8, 9, A-14, 15.) Applying California's statutory definition of res judicata (Cal. Code of Civil Procedure section 1908 subdivision (a) (2) (West 1983)), as well as California case law delineating the doctrine (See, e.g., *Bernhard v. Bank of America* (1942) 19 Cal.2d 807, 122 P.2d 892), the Court of Appeal rejected as "inconsistent" and "nonsensical at best" petitioners' arguments that they were suing as bondholders, not landowners, and therefore were not adverse parties in the prior action and could not be considered in privity with the previous landowners. (Pet.App. A-9 through A-12.) The court reiterated its ruling in *Call v. Feher, supra,* 93

Cal.App.3d at p. 434, 155 Cal.Rptr. at 391, that the CTRPA ordinance affects only the property, and not any legal obligation or right under the bond agreement. The court referred not only to its own prior decision, but also to a parallel federal case involving identical Contract Clause assertions and a similar subdivision prohibition brought by Nevada municipal improvement bondholders against the bi-state Tahoe Regional Planning Agency. (*Northwestern Nat. Life Ins. Co. v. Tahoe Regional Planning Agency* (9th Cir. 1980) 632 F.2d 104, *affirming Northwestern Nat. Life Ins. Co. v. Jordan* (D.Nev. 1978) 447 F.Supp. 856.) (Pet.App. A-13, 14.)[3]

Finally, the appellate court below ruled that neither fairness nor equity prevented application of res judicata, not only as to issues actually litigated in the prior action, but as to any claims the Calls were making that might have been litigated in the prior action. The court observed that not only could petitioners have anticipated the prior judgment, as parties they acquiesced in that part of the judgment upholding the validity of CTRPA's subdivision restriction against their predecessors in title. (Pet. App. A-1, 2; A-13; A-15, 16.)

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3. Conversely, the Ninth Circuit Court of Appeals opinion in *Northwestern* cites *Call v. Feher* in recognizing that the bond agreement at issue therein contained no promise that the assessed lands would be free from restrictive zoning, and therefore no contract impairment resulted from the land use restriction. *(Northwestern Nat. Life Ins. Co. v. Tahoe Regional Planning Agency, supra,* 632 F.2d at p. 106.)

REASONS WHY THE WRIT SHOULD BE DENIED

I.

The State Court Decision Below, Based Entirely On California's Res Judicata Doctrine, Presents No Federal Question And Rests On Adequate State Grounds.

The decision below holds that, as a matter of state law, petitioners' complaint against CTRPA is barred on the grounds of res judicata. The decision is based entirely upon the state courts' application of the doctrine of res judicata, as embodied by state statute (Cal. Code of Civ. Proc. sec. 1908(a)(2) (West 1983)), and as delineated by California's reported case law. The immediate question is whether such a decision gives rise to federal issues over which this Court has jurisdiction. This Court lacks jurisdiction to review state court judgments based on adequate non-federal grounds. (*Murdock v. Memphis* (1875) 87 U.S. (20 Wall.) 590.) Since the decision here is based exclusively on adequate non-federal grounds, this Court lacks jurisdiction to review it even though federal questions were alleged in petitioners' complaint. (*McCoy v. Shaw* (1928) 277 U.S. 302, 303).

The exact jurisdictional issue presented herein was decided over a century ago by this Court on a set of facts demonstratively similar to those in this case. In *Chouteau v. Gibson* (1884) 111 U.S. 200, Chouteau and Maffit filed suit in a Missouri state court against Gibson to obtain a conveyance of certain lands. As one of his defenses, Gibson pleaded a prior judgment in his favor against Chouteau and Maffit to recover possession of the same lands, alleging that the identical matters were adjudicated by the prior

action. The Missouri Supreme Court entered judgment in favor of Gibson on the ground of res judicata alone, without considering the merits of the other issues in the case. This Court in granting a motion to dismiss for want of jurisdiction, held:

> "Such being the case, it is clear we have no jurisdiction. The legal effect of the judgment set up in bar is a question of general law as to which the decision of the State court is not reviewable here. The federal questions, if any there were in the case, lay behind this defence, and could not be reached until it was out of the way. The question presented by the defence was not whether a federal right had been properly denied by a former judgment, but whether the right had been once judicially determined so as to become *res judicata* between the parties. Whether an equitable title could be set up in bar of the action at law brought by Gibson, the holder of the legal title, to recover possession, is a question of State law upon which the judgment of the State court is conclusive. The same is true of the question whether the pleadings in the former action were such as to present the equitable defence in proper form for final adjudication. The court below has decided that the pleadings were sufficient; that the equitable defence could be made, and that the judgment in that action in favor of Gibson was, in its legal effect, a judgment that Chouteau and Maffit had no title to the land in controversy. Consequently that judgment was a bar to this action, and precluded the court below as well as this court from reopening the original litigation and considering again the questions that were put at rest

between the parties by the decision in their former suit. It is apparent, therefore, that no federal question which there may have been in the case was decided by the State court, and that the decision of such a question was not necessary to the final decree rendered. Without determining whether if the former judgment had not been a bar to the action, there were questions in the case that might have given us jurisdiction, we grant the motion to dismiss." (111 U.S. at 201.)

Chouteau v. Gibson presents in a nutshell the law applicable to this case. The legal effect of the judgment in *Call v. Feher* as res judicata of the issues in this case is a question of state law which is not reviewable in this Court. The federal questions alleged in petitioners' complaint lay behind CTRPA's defense of res judicata, and could not be reached unless it was out of the way. The issue below was not whether these asserted federal questions had been properly denied by the prior action, but whether the federal issues had been judicially determined so as to become res judicata between the parties. The prior decision in *Call v. Feher* found the CTRPA subdivision restriction constitutionally valid as applied to the property in question and the bond agreement in question. Consequently, the state courts in the present action correctly refused to relitigate the same issues involving the same parties and the same land.[4] Adjudication of the

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4. Petitioners' argument that application of res judicata to them is a denial of due process is without merit. Petitioners, being parties and in privity with other parties in the prior acton, either litigated or had the opportunity to litigate all of the

(Continued on following page)

merits of petitioners purported federal constitutional claims was not necessary to support a finding that res judicata bars petitioners' entire complaint. (*Chouteau v. Gibson, supra,* 111 U.S. at p. 201.)

The state court of appeal made its decision applying state statutory law and settled California case law on the subject of res judicata.[5] The decision rests on a fair and substantial state law basis. As was the case in *Chouteau v. Gibson, supra,* the jurisdictional prerequisite for review by this Court, a substantial federal question actually decided by the state court, is absent in this case. (*McCoy v. Shaw,* 227 U.S. at p. 302.)

(Continued from previous page)

claims they assert in the present case. Their situation is distinguishable from those whose interests were not represented in the prior litigation. (See *Postal Telegraph Cable Co. v. City of Newport, Kentucky* (1918) 247 U.S. 464, 476; *Blonder-Tongue Laboratories, Inc. v. University Foundation* (1971) 402 U.S. 313, 317-330.)

5. Petitioners implicitly admit the soundness of the decision below by totally ignoring the California authorities upon which it is based. Rather, they base their contention that res judicata is inapplicable to their state court action by citing a plethora of federal cases construing the doctrine of res judicata as applied in the federal courts. (Pet. Cert. pp. 43-51.) Without discussing the considerable Erie doctrine problems petitioners' approach presents, there is nothing in the federal law of res judicata as discussed in the cases cited by petitioners which would preclude application of the doctrine under the present set of facts if this case and the prior case had been litigated in the federal court system. In fact, federal res judicata law follows the criteria set forth in the landmark California Supreme Court decision written by Justice Traynor in *Bernhard v. Bank of America* (1942) 19 Cal2d 807, 122 P.2d 892, and relied on by the court below in barring petitioners' present suit. (Pet.App. A-11, A-20.) (See *Blonder-Tongue Laboratories, Inc. v. University Foundation, supra, fn.3,* 402 U.S. at pp. 323-330.)

II.

Petitioners' Complaint Raises No Substantial Questions Under The Just Compensation Clause Or The Contract Clause.

A. CTRPA's Ordinance On Its Face Does Not Deprive Petitioners Of Their Property Without Just Compensation.

Petitioners' allegations that the CTRPA ordinance effects a taking without just compensation are completely foreclosed by this Court's decision in *Agins v. City of Tiburon* (1980) 447 U.S. 255. The complaint admits petitioners' land is zoned residential. The taking allegations are not only inconsistent with this admission, but also with the express terms of section 7.15-7.25 of the ordinance, which demonstrate that residential development is allowed under any of the various residential classifications. (Resp. App.) Under California practice, uncontroverted allegations in a complaint inconsistent with the express terms of a governmental ordinance may be rejected. (See *Agins v. City of Tiburon, supra,* 447 U.S. 255, 259 fn. 6.)

Since CTRPA's ordinance by its terms would allow petitioners to construct at least one residence, and since petitioners never applied to CTRPA for such development as the ordinance would permit, there is no controversy here regarding the ordinance as applied. (*Agins v. City of Tiburon, supra,* at p. 260.)

CTRPA's temporary subdivision restriction substantially advances legitimate governmental goals of controlling urbanization harmful to the environmental quality of the Lake Tahoe basin. The protection of the Tahoe area is one of California's highest priorities. (See *Call v. Feher, supra,* 93 Cal.App.3d at p. 422, 155 Cal.Rptr at

p. 390); *People ex rel. Younger v. County of El Dorado, supra,* 5 Cal.3d 480, 96 Cal.Rptr. 553, 487 P.2d 1193; Cal. Gov. Code secs. 67000-67002 (West 1983); Cal. Gov. Code sec. 66801 (West supp. 1984).) The ordinance is therefore a legitimate exercise of the state's police power. (*Agins v. City of Tiburon, supra,* at p. 261; *Penn Central Transp. Co. v. New York City* (1978) 438 U.S. 104, 129.)

Although CTRPA's ordinance limits development by posing an interim restriction on subdivision, it does not prohibit the best use of petitioners' land, which they admit is residential. Nothing in the express terms of the ordinance prevents petitioners from prohibiting public use of the property; no "fundamental attribute of ownership" has been extinguished. (See *Kaiser Aetna v. United States* (1979) 444 U.S. 164, 179-180.)

Having purchased the property long after the effective date of the subdivision restriction, petitioners cannot be said to have had any "reasonable investment-backed expectation" to subdivide the property. They were free to pursue their reasonable investment expectations by submitting a development plan to CTRPA. Under these circumstances, it cannot be said that the ordinance denied petitioners the "justice and fairness" guaranteed by the Fifth and Fourteenth Amendments. (*Agins v. City of Tiburon, supra,* at p. 263; see *Penn Central Transp. Co. v. New York City* 438 U.S. at p. 124.)

In light of this Court's *Agins* decision, there is no real controversy or substantial federal question concerning petitioners' just compensation allegations for this Court to review. (See *Zacht v. King* (1922) 260 U.S. 174, 176.)

B. The CTRPA Subdivision Restriction, A Valid Exexercise Of The State's Police Power, Does Not Impair The Obligation Of Petitioners' Bond.

Aside from its res judicata effect on the present case, *Call v. Feher, supra,* 93 Cal.App.3d 434, 155 Cal.Reptr. 387, together with *Northwestern Nat. Life Ins. Co. v. Tahoe Regional Planning Agency, supra,* 632 F.2d 104, dispose of petitioners' argument that the CTRPA subdivision restriction impairs their alleged contractual interests.[6]

The subdivision restriction affected only the property, not any legal right or obligation under petitioners' bond. Such an effect on the underlying subject matter of a contract does not contravene the Contract Clause. (*Northwestern Nat. Life Ins. Co. v. Tahoe Regional Planning Agency, supra,* 632 F.2d at p. 106.) Nothing CTRPA did prevented the bond obligors from making payments of principal and interest, the bond purchasers from receiving them, or the County from constructing the bond-financed improvements. *(Call v. Feher, supra,* 93 Cal.App.3d at p. 444, 155 Cal.Rptr. at p. 391.)

The claims set forth by petitioners refer to the effects of the ordinance on the ability to subdivide the property. (Pet.App. A-4.) Only the fee owner of the land is capable of subdividing it. Even petitioners admit that they never had the right or ability to subdivide the land in their status as bondholders. (Pet.App. A-11.) Neither the statute authorizing the issuance of petitioners' bond (Cal. Streets) and Highways Code, secs. 6400, et seq. (West 1969)) nor the bond itself guaranteed that the land would be free

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6. As the decision below notes, none of these alleged contractual interests are clearly stated in the complaint. (Pet. App. A-9.)

from restrictive zoning. (See *Northwestern Nat. Life Ins. Co. v. Tahoe Regional Planning Agency, supra,* at pp. 106-107.)[7]

CTRPA's subdivision restriction is an exercise of the state's police power to protect the ecologically fragile Lake Tahoe region from the harmful effects of uncontrolled urbanization and population growth. *(Call v. Feher, supra.)* Such a governmental purpose long has been recognized as legitimate. *(Agins v. City of Tiburon, supra,* 447 U.S. at p. 261.) The future exercise of this power could not have been contracted away, by either CTRPA or by Placer County, even assuming the existence of some sort of promise to allow subdivision. *(Stone v. Mississippi* (1880) 101 U.S. 814, 817; *Call v. Feher, supra.)* The Contract Clause does not require a state to adhere to a contract that surrenders this essential attribute of its sovereignty. *(United States Trust Co. v. New Jersey* (1976) 431 U.S. 1, 23.) Unlike the situation presented in *United States Trust Co. v. New Jersey,* the present case, even if petitioners' assertions are believed, does not involve a purely financial promise not compromising the state's reserved powers. (See 431 U.S. at p. 25.)

Petitioners have failed to allege an impairment which falls within the prohibition of the Contract Clause. There is no controversy under Article I, Section 10 for this Court to review.

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7. Petitioners admitted that they had no express or implied understanding with Placer County about future subdivision of land in their brief to the state appellate court in *Call v. Feher:* "There is no evidence showing that governmental zoning restrictions were not foreseeable . . . [t]here is no evidence respondents Calls purchased the bond assuming the land would be subdivided."

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

JOHN K. VAN DE KAMP, Attorney General
of the State of California

N. GREGORY TAYLOR,
Assistant Attorney General

MICHAEL L. CROW, (Counsel of Record)
Deputy Attorney General

Attorneys for Respondent

APPENDIX

CALIFORNIA TAHOE REGIONAL PLANNING AGENCY LAND USE ORDINANCE

(Adopted September 19, 1975)

CHAPTER 7. USE DISTRICTS

Section 7.11 Use Districts

Regulations indicating the allowable land uses and densities in each district are hereby established as set forth in sections 7:15-7.25. The permitted uses shall include accessory uses consistent with such permitted uses. The permitted uses are stated as illustrative of the types of uses consistent with the Regional Plan. The listings are not intended to be exclusive except as otherwise indicated and for the density limitations set forth and for the exclusion of commercial uses from other than commercial districts. An intent of the Ordinance is to encourage local governments to adopt plans and ordinances which are adapted to local needs and desires within the framework of uses established by this Ordinance.

Section 7.15 General Forest District

(a) Specific Purposes:

(1) To preserve outdoor recreational opportunities.

(2) To permit the growing and harvesting of timber, agricultural activities, and extraction of resources.

(b) Permitted Uses:

None but the following uses, or those which are found by the Agency to be appropriate and similar in nature, shall be permitted:

(1) Residential: None, except one single family house may be constructed on any legal lot or parcel of record existing as of February 10, 1972, provided however, that this section shall not apply to lots in residential subdivisions where the final map of such subdivision was approved and filed for record more than five (5) years prior to February 10, 1972 and there has been no construction of roads, sewers, or other substantial facilities serving the subdivision, or the posting of performance bonds assuring such construction, prior to February 10, 1972.

(2) Tourist Residential: None

(3) Outdoor Recreation:

a) Hiking trails and undeveloped campgrounds;

b) Developed campgrounds;

c) Riding trails, pack stations, corrals, stables, and accessory facilities;

d) Organized recreation camps;

e) Skiing facilities.

(d) In no event will the filling, grading or construction requiring the filling or grading of wet lands, stream environment zones, flood plains or any area that would have to be filled in order to ensure protection from floods be permitted unless the project is included in the adopted Regional Transportation Plan. Construction on already filled wet lands or flood plains, other than of a single family house on a lot existing in a residential subdivision as of February 10, 1972, shall not be permitted.

(5) Public and Quasi-Public:

a) Roads and water crossing structures;

b) Radio, television and telephone relay stations and transmission lines and structures;

c) Overhead and underground utilities;

d) Historic sites;

e) Fire protection facilities;

f) Water storage tanks and reservoirs;

g) Sewage lift stations; and

h) Electrical substations.

(6) Commercial: None.

Section 7.16 Recreation District

(a) Specific Purposes:

(1) To assure adequate public opportunity for outdoor recreation, including skiing facilities, boating, day use areas, and access to public and quasi-public beaches.

(b) Permitted uses:

None but the following uses, or those which are found by the Agency to be appropriate and similar in nature shall be permitted.

(1) Residential: None, except one single family house may be constructed on any legal lot or parcel of record existing as of February 10, 1972, provided, however, that this section shall not apply to lots in residential subdivisions where the final map of such subdivision was approved and filed for record more than five (5) years prior to February 10, 1972 and there has been no construction of roads, sewers, or other substantial facilities serving the subdivision, or the posting of performance bonds assuring such construction, prior to February 10, 1972.

(2) Tourist Residential: None

(3) Outdoor Recreation:

a) All those permitted in the General Forest district;

b) Day Use Areas; and

c) Outdoor Recreation Concessions.

(4) Resource Management and Agriculture:

a) Forest Management Programs.

(5) Public and Quasi-Public:

a) All those permitted in the General Forest district;

b) Educational Facilities, Avocational.

(6) Commercial: None

Section 7.17 Rural Estates District

(a) Specific Purposes:

To provide for very low density residential uses primarily in those areas within the region which have been developed in such a manner, private recreation uses and tree farms.

(b) Permitted Uses:

None but the following uses, or those which are found by the Agency to be appropriate and similar in nature, shall be permitted.

(1) Residential:

a) One single family house may be constructed on any lawfully created lot or parcel of record existing as of September 19, 1975.

b) If the subdivision restriction in sections 5.13, 7.14(a) and 8.15 is terminated by amendment of this Ordinance, single family dwelling units

up to one (1) dwelling unit per acre; and

c) Accessory guest house and private stables—with either a or b.

(2) Tourist Residential: None

(3) Outdoor Recreation:

a) Private recreation areas; and

b) Hiking and riding trails.

(4) Resource Management and Agriculture:

a) Forest management programs;

b) Tree farms; and

c) Regulated grazing of animals in undeveloped areas.

(5) Public and Quasi-Public:

a) All those permitted in General Forest District except microwave relay stations;
and

b) Communications equipment buildings.

(6) Commercial: None

Section 7.18 Low Density Residential District (LDR)

(a) Specific Purposes:

(1) To preserve outdoor recreational opportunities for all income groups;

(2) To permit the growing and harvesting of trees, agricultural activities, and extraction of resources;
and

(3) To permit each property owner the option of residental use of his property.

(b) Permitted Uses:

None but the following uses, or those which are found by the Agency to be appropriate and similar in nature, shall be permitted:

(1) Residential:

a) One single family house may be constructed on any lawfully created existing lot or parcel of record existing as of September 19, 1975; and

b) If the subdivision restriction in sections 5.13, 7.13a and 8.15 is terminated by amendment of this Ordinance, single family dwelling units up to one dwelling unit per acre.

(2) Tourist Residential: None

(3) Outdoor Recreation:

a) All those permitted in the Rural Estates district;

b) Day use areas;

c) Developed and undeveloped campgrounds;

d) Pack stations, corrals, stables and accessory facilities in undeveloped areas;

e) Organized recreation camps; and

f) Skiing facilities.

(4) Resource Management and Agriculture:

a) Forest management programs;

b) Tree farms; and

c) Regulated grazing of animals in undeveloped areas.

(5) Public and Quasi-Public:

a) All those permitted in the General Forest District except microwave relay stations;

b) Communications equipment building;

c) Religious facilities;

d) Education facilities, general;

e) Water treatment plant.

(6) Commercial:

a) Home occupations.

Section 7.19 Medium Density Residential

(a) Specific Purposes:

(1) To provide for residential uses consistent with the existing character of areas within the region and environmental protion.

(b) Permitted Uses: None but the following uses, or those which are found by the Agency to be appropriate and similar in nature, shall be permitted:

(1) Residential:

a) One single family house may be constructed on any lawfully created lot or parcel of record existing as of September 19, 1975;
and

b) If the subdivision restriction in sections 5.13, 7.14(a) and 8.15 is terminated by amendment of this Ordinance, single family dwelling units up to 4 dwelling units per acre.

c) Facilities designed and occupied in accordance with local, regional, state or federal programs for the assis-

tance of persons of low or moderate income in need of adequate housing, or housing units which are guaranteed to be available for rental or sale at a cost affordable by persons at or below the median income assuming up to 25% of income is available for housing costs. The densities shall be determined on the basis of the individual project, but shall not exceed eight (8) units per acre.

(2) Tourist Residential: None

(3) Outdoor Recreation:

a) All those permitted in the Low Density Residential District.

(4) Resource Management and Agriculture:

a) Forest management programs; and

b) Tree farms.

(5) Public and Quasi-Public:

a) All those permitted in the Low Density Residential District;

b) Child care nurseries;

c) Police protection facilities; and

d) Medical facilities.

(6) Commercial:

a) All those permitted in the Low Density Residential District.

Section 7.20 High Density Residential District

(a) Purposes:

(1) To provide for residential uses open to low as well as other income groups consistent with the existing character of

areas within the region and environmental protection.

(b) Permitted Uses: None but the following uses, or those which are found by the Agency to be appropriate and similar in nature, shall be permitted:

(1) Residential:

a) One single family house may be constructed on any lawfully created lot or parcel of record existing as of September 19, 1975;

b) If the subdivision restriction in sections 5.13, 7.14(a) and 8.15 is terminated by amendment of this Ordinance, single family dwelling units up to eight (8) dwelling units per acre;

c) Multiperson dwellings not to exceed facilities for 40 persons per acre;

d) Mobile home parks for permanent residences up to eight (8) mobile homes per acre; and

e) Facilities designed and occupied in accordance with local, regional, state or federal programs for the assistance of persons of low or moderate income in need of adequate housing, or housing units which are guaranteed to be available for rental or sale at a cost affordable by persons at or below the median income assuming up to 25% of income is available for housing costs. The densities shall be determined on the basis of the individual project but shall not exceed fifteen (15) units per acre.

(2) Tourist Residential: None

(3) Outdoor Recreation:

a) Private recreation areas;

b) Hiking and riding trails; and

c) Day use areas.

(4) Resource Management and Agriculture:

a) Forest management programs.

(5) Public and Quasi-Public:

a) All those permitted in the Medium Density Residential District; and

b) Cultural facilities.

(6) Commercial:

a) All those permitted in the Medium Density Residential District; and

b) Professional offices.

Section 7.21 Tourist Commercial District

(a) Specific Purposes

(1) To provide adequate space for motels, hotels and related facilities to house and provide services for tourist visitors including those of low income to the region in appropriate locations and consistent with environmental constraints.

(b) Permitted Uses: None but the following uses, or those which are found by the Agency to be appropriate and similar in nature, shall be permitted:

(1) Residential:

a) One single family house may be constructed on any lawfully created lot or parcel of record existing as of September 19, 1975;

b) If the subdivision restriction in sections 5.13, 7.14(a) and 8.15 is terminated by amendment of this Ordinance, single family dwelling units up to eight (8) dwelling units per acre;

c) Multiperson dwellings not to exceed facilities for 40 persons per acre;

d) Mobile home parks for permanent residences up to eight (8) mobile homes per acre; and

e) Facilities designed and occupied in accordance with local, regional, state or federal programs for the assistance of persons of low or moderate income in need of adequate housing, or housing units which are guaranteed to be available for rental or sale at a cost affordable by persons at or below the median income assuming up to 25% of income is available for housing costs. The densities shall be determined on the basis of the individual project but shall not exceed fifteen (15) units per acre.

(2) Tourist Residential:

a) Transient dwelling units up to 20 units per acre provided that up to ten percent of such dwelling units may include kitchen facilities.

b) Recreation vehicle parks up to 8 recreational vehicles per acre.

(3) Outdoor Recreation:

a) All those permitted in the High Density District;

b) Skiing facilities; and

c) Outdoor amusement facilities.

(4) Resource Management and Agriculture:

a) Forest management programs.

(5) Public and Quasi-Public:

a) All those permitted in the High Density Residential District; and

b) Transportation facilities.

(6) Commercial and Industrial

a) All those permitted in the High Density Residential District;

b) Indoor amusement facilities; and

c) Limited commercial.

Section 7.22—General Commercial District

(a) Specific Purposes:

(1) To assure adequate areas in appropriate locations for commercial services necessary within the Region.

(b) Permitted Uses: None but the following uses, or those which are found by the Agency to be appropriate and similar in nature, shall be permitted:

(1) Residential: None except that accessory to the permitted use.

(2) Tourist Residential:

a) All those permitted in the Tourist Commercial District.

(3) Outdoor Recreation:

a) All those permitted in the Tourist Commercial District.

(4) Resource Management and Agriculture:

a) Forest management programs.

(5) Public and Quasi-Public:

a) All those permitted in the Tourist Commercial District;

b) Educational facilities, vocational;

c) Post Office facilities;

d) Incarceration facilities; and

e) Solid waste transfer stations.

(6) Commercial and Industrial:

a) All those permitted in the Tourist Commercial District:

b) Commercial;

c) Light industrial;

d) Batch plants;

e) Bulk storage;

f) Electric power plant; and

g) Wrecking yards.

Section 7.23 Public Service District

(a) Specific Purposes:

(1) To provide a district that enables the coordinated placement of public facilities.

(b) Permitted Uses:

(1) Residential: None, except those directly related to permitted Educational Facilities.

(2) Tourist Residential. None.

(3) Outdoor Recreation: None, except those directly related to permitted Educational Facilities.

(4) Resource Management and Agriculture:

a) Forest management programs.

(5) Public and Quasi-Public:

a) All those permitted in the General Commercial District; and

b) Airports.

(6) Commercial and Industrial: None

Section 7.24 Conservation Reserve District

(a) Specific Purposes

(1) To identify those lands susceptible to future development pursuant to the preparation of specific plans indicating the impacts on the region of the proposed land use, population density, transportation, flood control, forest and wildlife conservation, water quality control, environmental protection, community design, recreation, schools, and other necessary facilities.

(b) Permitted Uses:

(1) All those permitted in the General Forest District;

(2) Uses not of a greater intensity of use than that authorized in the Low Density Residential District, as of the date the use is permitted. Such use shall not be permitted unless and until the applicant has obtained a TRPA General Plan amendment authorizing the proposed use. If the use is subsequently permitted by the Agency, it must be conditioned upon TRPA approval of the specific plan of development and permit.

Section 7.25 Medium Tourist Residential

(a) Specific Purposes

To provide for tourist residential uses consistent with the existing character of areas within the region and environmental protection.

(b) Permitted Uses: None but the following uses, or those which are found by the Agency to be appropriate and similar in nature, shall be permitted:

(1) Residential:

a) One single family house may be constructed on any lawfully created lot or parcel of record existing as of September 19, 1975;

b) Multiperson dwellings not to exceed facilities for 25 persons per acre;

c) Mobile home parks for permanent residences up to six (6) mobile homes per acre; and

d) If the subdivision restriction in section 5.13, 7.14(a) and 8.15 is terminated by amendment of this Ordinance, single family dwelling units up to eight (8) dwelling units per acre.

(2) Tourist Residential:

a) Transient dwelling units up to 20 units per acre provided that one unit contained in development, to be used as a permanent residential unit, may contain kitchen facilities; and

b) Transient dwelling units with kitchen facilities up to fifteen (15) units per acre.

(3) Outdoor Recreation:

a) All those permitted in the High Density Residential District; and

b) Outdoor amusement facilities.

(4) Resource Management and Agriculture:

a) Forest management programs.

(5) Public and Quasi-Public:

a) All those permitted in the High Density Residential District; and

b) Transportation facilities.

(6) Commercial and Industrial:

a) All those permitted in the High Density Residential District; and

b) Indoor amusement facilities.